Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

Anh "Joseph" Cao and the
Republican National Committee, *Petitioners*

v.

The Federal Election Commission, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari

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Questions Presented

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), the constitutionality of limits on coordinated political party expenditures in a case involving "more of the party's own speech," as opposed to "payment of the candidate's bills," was "not reach[ed]." *Id.* at 456 n.17. *See also id.* at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting) ("unresolved" "constitutionality ... as applied to" "coordinated expenditures ... not ... functionally identical to contributions"). This case presents that issue, certified to the Fifth Circuit thus: "Do the expenditure and contribution limits and contribution provision in 2 U.S.C. §§ 441a(d)(2-3), 441a(a)(2)(A), and 441a(a)(7)(B)(i) violate ... First Amendment rights ... as applied to coordinated communications that convey the basis for the expressed support?"

Two questions are presented:

1. Whether the holding that contributions may be limited under lowered scrutiny because they "do[] not communicate the underlying basis for the support," "involve[] little direct restraint on [speech]," "involve speech by someone [else]," and "transformation ... into political debate involves [another's] speech," *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), permits the government to restrict expenditures for communications constituting a political party's own speech because the communications are coordinated with a candidate.

2. In the alternative, whether party coordinated expenditures constituting a party's own speech may constitutionally be treated as contributions if the only coordination is "on which time slot the advertisement should run for maximum effectiveness," *Colorado-II*,

533 U.S. at 468 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).

Parties to the Proceeding

Petitioners in this Court (Plaintiffs below) are Anh "Joseph" Cao and the Republican National Committee ("RNC"). Plaintiff Republican Party of Louisiana was held to lack standing under 2 U.S.C. 437h and is not a petitioner.

Respondent in this Court (Defendant below) is the Federal Election Commission ("FEC").

Corporate Disclosure Statement

Neither Petitioner is a corporation, so there is no parent company or publicly held company owning 10% or more of stock. Sup. Ct. R. 29.6.

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Petition

Petitioners seek a writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit to review its judgment herein.

Opinions Below

The Fifth Circuit's opinion is in the Appendix ("App.") at 1a and available at *In re Cao*, 619 F.3d 410 (5th Cir. 2010) (en banc) ("*Cao*"). The district court's Order and Reasons, App. 89a, is available at *Cao v. FEC*, 688 F.Supp.2d 498 (E.D. La. 2010).

Jurisdiction

The Fifth Circuit's judgment was entered September 10, 2010. This Court has jurisdiction. 28 U.S.C. 1254(1).

Constitutions, Statutes, and Regulations Involved

Appended are: First Amendment, App. 195a; 2 U.S.C. 431(8) ("contribution" definition), App. 195a; 2 U.S.C. 431(9) ("expenditure" definition), App. 200a; 2 U.S.C. 431(16) ("independent expenditure" definition), App. 204a; 2 U.S.C. 431(17) ("political party" definition), App. 204a.; 2 U.S.C. 437h (judicial review provision), App. 204a; 2 U.S.C. 441a(a)(2)(A) ($5,000 contribution limit), App. 205a; 2 U.S.C. 441a(a)(7)(B)(i) ("Coordination-Contribution Provision"), App. 205a; 2 U.S.C. 441a(d)(2-3) ("Party Expenditure Provision"), App. 205a.

Statement of the Case

A. Introduction

This case presents a question that this Court has expressly reserved: whether a political party's "expendi-

tures" that contain a party's "own speech" may be treated as "contributions" if they are coordinated with the party's candidate. If treated as contributions, they are subject to limits diminishing the amount of coordinated "own speech" possible. Under this Court's fundamental First Amendment distinction between "contributions" and "expenditures," *see Buckley*, 424 U.S. at 19-23, an expenditure for a communication containing a party's own speech should not be subject to treatment and limitation as a contribution even if coordinated.

If that is so, the next question is where the line is to be drawn in a test defining a party's "own speech." The Plaintiffs and the two dissents here offer three options that provide a basis for this Court's analysis in establishing a constitutional test.

Moreover, this case shows that "independent expenditures," which are the only currently available avenue for a political party's unlimited "own speech," do not adequately protect a party's First Amendment right to engage in its own core political speech. And recent judicial decisions leave political parties—traditionally favored—at a disadvantage relative to corporations, unions, trade associations, special interest groups, and political action committees ("PACs") in their ability to engage in independent expenditures.

This petition should be granted so that this Court may answer the unresolved question and provide a test for determining when a coordinated political party expenditure constitutes the party's "own speech," thereby reducing somewhat the disadvantage that political parties now face.

B. Background

This case is a successor to *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado-I*"), and *Colorado-II*, 533 U.S. 431.

Colorado-I "held that spending limits set by the Federal Election Campaign Act ("FECA") were unconstitutional as applied to the Colorado Republican Party's independent expenditures in connection with a senatorial campaign." *Colorado-II*, 533 U.S. at 437. The case was "remanded for consideration of the party's claim that all limits on expenditures by a political party in connection with congressional campaigns are facially unconstitutional and thus unenforceable even as to spending coordinated with a candidate," and *Colorado-II* "reject[ed] that facial challenge to the limits on parties' coordinated expenditures." *Id.*

Colorado-II did "not reach" the constitutionality of the Party Expenditure Provision limits, 2 U.S.C. 441a(d)(2)-(3), as applied to communications "involv[ing] more of the party's own speech," as opposed to "no more than payment of the candidate's bills." 533 U.S. at 456 n.17. As the dissent put it, this Court left "unresolved" their "constitutionality . . . as applied to" "coordinated expenditures . . . not . . . functionally identical to direct contributions." *Id.* at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting). This case raises that unresolved issue, i.e., whether the First Amendment permits Congress to deem a party's "own speech" expenditures to be contributions by reason of coordination, even minor coordination, such as timing.

C. Statutory Scheme

FECA regulates the "contributions," 2 U.S.C. 431(8) (definition), and "expenditures," 2 U.S.C. 431(9) (defini-

tion)—including "independent expenditures," 2 U.S.C. 431(17) (definition)—of "political parties," 2 U.S.C. 431(16) (definition). *Buckley* held that under the First Amendment Congress may limit "contributions" but not "expenditures." 424 U.S. at 23-50.[1] So the constitutionally required distinction between contributions and expenditures is vitally important to parties.

FECA imposes a $5,000 limit per election on contributions from a political party to a candidate. 2 U.S.C. 441a(a)(2)(A). If a political party coordinates what would otherwise be an expenditure—regardless of the *degree* of coordination—FECA requires that expenditure to count, as an "in-kind contribution," against applicable contribution limits under the Coordination-Contribution Provision. 2 U.S.C. 441a(a)(7)(B)(i).

The Party Expenditure Provision provides additional spending authority for political parties—treated

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[1] *Buckley* noted that federal law treats coordinated expenditures as contributions, 424 U.S. at 46 n.53, but the constitutionality of applying this to *own-speech* communications of the sort identified as fully-protected speech by *Buckley*, 424 U.S. at 19-23, was neither raised nor decided. The specific constitutional analysis in *Buckley*'s General Principles, *id.*, must control the application of FECA's treatment of coordinated expenditures as contributions. *Buckley* said that the coordinated-expenditure problem to be avoided was "to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities," *id.* at 46, which does not include own-speech communications. Moreover, there would have been no reason for *Colorado-II* to leave open the question of applying contribution limits to own-speech party coordinated expenditures if mere coordination resolved the constitutional problem.

as coordinated but not necessarily actually coordinated—which is adjusted for inflation and authorizes (in 2010) $43,500 in races for the House of Representatives (except for races in single-district states, for which the limit is $87,000) and ranging from $87,000 to $2,395,400 for Senate races. 2 U.S.C. 441a(d)(2-3).

In addition, parties may make independent expenditures in an unlimited amount, as permitted by *Colorado-I*, 518 U.S. at 608. But in practice this provides inadequate protection for a party's right to engage in its "own speech." *See infra* Part I.C.2.

D. Facts[2]

RNC is the national committee of the Republican Party. It seeks to advance its core principles by advocating Republican positions and electing Republican candidates.

In 2008, Anh "Joseph" Cao was a Republican candidate for U.S. Representative in Louisiana. Cao wanted to participate with RNC to the maximum extent constitutionally permissible in the activities outlined below.

When the complaint was filed, RNC had already reached its $5,000 contribution limit and spent or committed to spend its $42,100 coordinated expenditure limit in connection with Cao's race. RNC would have made more expenditures subject to the contribution and expenditure limits had it been legal to do so. A specific activity that RNC intended was broadcasting the following *Cao Ad*:

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[2] The district court made findings of fact. (App. 102a-158a.). This case is not moot because it is capable of repetition yet evading review and Petitioners verified their intent to engage in materially similar future activity.

Why We Support Cao

The Republican National Committee has long stood for certain core principles, which we believe are the fundamentals of good government. When it comes to the issues of lower taxes, individual freedoms and a strong national defense, we need leaders who will stand with the American people and defend those issues.

We need leaders who understand that our economy is in a recession, our individual freedoms are constantly under attack and we continue to fight the global war on terrorism to keep our families safe.

Joseph Cao understands and fights for those issues. And, that is why we ask you to join us in supporting him on December 6. It's important for Louisiana and important for the country.

The *Cao Ad* would have been coordinated with Cao only as to the best timing for airing it.[3]

E. Litigation

Plaintiffs filed their initial complaint on November 13, 2008. On December 23, they moved for certification of constitutional questions under FECA's judicial review provision, 2 U.S.C. 437h. The certification motion

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[3] The Fifth Circuit majority made much of the fact that Rep. Cao became aware of the *content* of the ad in the course of litigation. App. 41a-47a. Chief Judge Edith Jones in dissent noted that "after the past several years in litigation Cao would have to admit his awareness of the ad!" and that "[t]iming-only is the stipulation in the district court and therefore the only 'fact' before us." App. 52a n.4 (Jones, C.J., joined by Smith, Clement, Elrod & Haynes, JJ., concurring in part and dissenting in part) ("Jones dissent").

was first considered on February 4, 2009. After extensive discovery, the parties submitted supplemental briefing on certification. Oral argument was held on November 9. On January 27, 2010, the district court issued an order certifying some of Plaintiffs' proposed questions in whole or in part and dismissing others. Plaintiffs noticed appeal with respect to the non-certified questions on February 17. On March 1, the Fifth Circuit consolidated consideration of certified questions and non-certified questions. The Fifth Circuit's judgment was entered September 10, ruling against Plaintiffs on all counts.[4]

F. Issue, Holding & Dissents

On the "own speech" party coordinated expenditure issue that is the subject of this petition, Plaintiffs noted that *Colorado-II* both recognized that coordinated activity ranges from merely paying a candidate's bills to speech otherwise indistinguishable from an "independent expenditure" communication, which may not be limited, and left open the question of whether "own speech" communications could be treated as contributions by reason of coordination. *See Colorado-II*, 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). Plaintiffs argued that "own speech" coordinated communications must not be treated as contributions because *Buckley*'s justification for limiting contributions was that were not the contributor's own speech.

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[4] Under 2 U.S.C. 437h, the district court had jurisdiction to certify questions to the Fifth Circuit en banc, *see also* 28 U.S.C. 1331 (district court federal-question jurisdiction), and the Fifth Circuit had jurisdiction over this case arising under the First Amendment and the Federal Election Campaign Act ("FECA"), 2 U.S.C. 431 *et seq.* *See also* 28 U.S.C. 2201 and 2202 (declaratory judgment jurisdiction).

See Buckley, 424 U.S. at 21. Plaintiffs set out a test for determining "own speech" that asks to whom the communication is *attributable*. *See infra* at 19-21. Plaintiffs also consistently returned to the *Cao Ad*, coordinated only as to timing, as one example of the sort of "own speech" ads that the *Colorado-II* dissent identified as not likely subject to regulation as a contribution. 533 U.S. at 468. This as-applied emphasis indicated clearly that at a minimum—even if the own-speech analysis were not recognized as controlling alone—a timing-only, own-speech ad could not be regulated as a contribution. Plaintiffs readily acknowledged that, *under FEC regulations*, the timing coordination was sufficient to make the *Cao Ad* a coordinated communication subject to coordination limits.

The *Cao* majority erroneously decided that Plaintiffs did not preserve the issue of whether treating own-speech coordinated communications as contributions was unconstitutional as applied to the timing-only, own-speech *Cao Ad*, relying on the oral-argument statements of counsel (1) that "'the degree of coordination does not affect *whose speech* it is at all,'" App. 27a-28a (emphasis added),[5] and (2) that as to whether an ad is *coordinated* it is like "being pregnant. You're either or not," App. 28a.[6] The majority then held that

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[5] Under Plaintiffs' test for determining "own speech," the controlling analysis is to whom the speech is attributable, not the degree of coordination. *See infra* at 18-20. So the answer cited is consistent with that and does not address the separate issue of whether *de minimis* timing coordination also affects the analysis.

[6] The answer cited is consistent with FEC *regulations*, *see* 11 C.F.R. 109.21, and has nothing to do with any asserted concession that the *Cao Ad* was regulable under

"[a]ssuming that the *Colorado II* Court left open the possibility for an as-applied challenge . . . , the facts and arguments of the instant case do not present this court with that question." App. 33a. This was so, under lowered scrutiny,[7] because "[i]f this court were to accept Plaintiffs' exceedingly broad argument, we would be reaching a conclusion inconsistent with . . . *Colorado II*'s . . . teaching that coordinated expenditures may be restricted." App. 34a.[8]

Colorado-II. The Jones dissent explains this clearly, App. 57a n.8, noting also that the majority left out the following bolded, controlling language from its citation of counsel's oral argument statement: "'There's no degree of being pregnant. You're either or not, and **under their regulations**, it is . . . ,'" App. 57a n.8 (bold in original opinion). Thus, "Counsel conceded only FEC's regulatory interpretation of the consequences of timing-only coordination, *not* the constitutionality of that interpretation." *Id.* (emphasis in original).

[7] The decision below apparently applied the "closely drawn" scrutiny applicable to contribution limits. *See* App. 33a (quoting *Colorado-II*, 533 U.S. at 456, regarding scrutiny applied to contribution limits). But since the issue is whether a party's coordinated own-speech expenditure *may be treated as a contribution*, this begs the question at issue.

[8] The decision below misstates Plaintiffs' position. It says that "under the Plaintiffs' standard, all coordinated expenditures paid for and adopted by the party would be considered a party's own speech and not subject to regulation." App. 35a. But this ignores the fact that Plaintiffs' own-speech test requires that the expenditure be for *speech*. *See infra* at 18-20. And the Fifth Circuit disagreed with the district court's statement that "'[t]he only type of party-coordinated communication that plaintiffs believe is not a

There were two dissents as to the questions presented by this petition. The Jones dissent (Jones, C.J., joined by Smith, Clement, Elrod & Haynes, JJ.), would have decided the issue narrowly as applied to the *Cao Ad*. It stated that "a narrow fact-based challenge [wa]s before the Court," App. 52a (capitalization altered), and that "the court must address narrow issues first," App. 59a (capitalization altered). In evaluating Cao's as-applied challenge, it applied strict scrutiny because the *Cao Ad* "hews closely to the independent expenditure side of the spectrum." App. 68a. It concluded that "[t]he FEC offered *no* evidence or argument that coordination of the Cao Ad as to broadcast timing will appreciably increase the risk or appearance of corruption or circumvention of contribution limits." App. 75a (emphasis in original). And it determined that under either strict or closely-drawn scrutiny the First Amendment prohibited treating the *Cao Ad* as a contribution by reason of coordination. App. 70a-79a.

The "Clement dissent" joined the Jones dissent, but "would go further . . . in fashioning a standard that protects political speech that is not the functional equivalent of a campaign contribution." App. 82a-88a

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party's "own speech" and therefore may be constitutionally limited is one that a campaign airs and for which the party merely pays the bill.'" App. 35a n.22 (citation omitted). The decision below asserts that "under Plaintiffs' argument even this type of communication would be considered the party's own speech if the party adopted the ad as its own." App. 35a n.22. Of course, that changes the facts. If an ad's speech is attributable to the candidate and the party pays the bill, the payment is an in-kind contribution. If an ad's speech is attributable to the party, it should not be deemed a contribution even if coordinated.

(Clement, J., joined by Jones, C.J., and Smith & Elrod, JJ., concurring in part and dissenting in part). It "s[aw] no reason that timing alone makes any difference in the constitutional analysis, and question[ed] whether a *de minimis* standard provides a line bright enough to avoid chilling protected speech through the threat of an enforcement action." App. 83a. Rather, "[t]he Supreme Court has drawn the relevant distinction between an expenditure and a contribution: a contribution 'serves as a general expression of support . . . ,' while an expenditure 'communicate[s] the underlying basis for support.'" App. 83a (quoting *Buckley*, 424 U.S. at 21). "[T]he goal of the anti-coordination rules . . . [is] preventing circumvention of the contribution limits by . . . simply paying a candidate's bills." 83a (citing *Buckley*, 424 U.S. at 47 n.53). But a "'timing only' standard does nothing to capture the difference between these two constitutionally distinct forms of communications" and "a *de minimis* standard is difficult to apply and interpret." App. 84a. The dissent argued that "[w]hat does make a difference in the constitutional analysis . . . is coordination as to the content of the ad," which was lacking as to the *Cao Ad.* App. 84a. The dissent then set out a "content-driven" "two-pronged standard" to determine when coordinated expenditures may be treated as contributions: "An advertisement is functionally identical to a contribution only if it is susceptible of no other reasonable interpretation than as a general expression of support for the candidate, *and* the ad was not generated by the candidate." App. 85a (emphasis in original).

Reasons to Grant the Petition

The petition should be granted because the Fifth Circuit (I) "decided . . . important question[s] of federal law that ha[ve] not been, but should be, settled by this Court" and (II) did so "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10.

I. Important Questions Presented Have Not Been, but Should Be, Settled by this Court.

The Fifth Circuit decided two important questions of federal law that this Court left "unresolved," *Colorado-II*, 533 U.S. at 468 n.2 (dissent): first, whether a political party's expenditure for a communication that constitutes its own speech may be considered a contribution by reason of coordination (Part I.A); and second, whether the fact that the coordination is only as to timing affects the answer to the first question (Part I.B). These are important questions of federal law that have not been, but should be, decided by this Court (Part I.C).

A. The Constitutionality of Treating as Contributions a Party's Own-Speech Coordinated Expenditures Is an Unresolved Question Not Precluded by *Colorado-II*.

In *Colorado-II*, this Court expressly left open the question of whether the Party Expenditure Provision limits were unconstitutional under the First Amendment as applied to expenditures for communications that constitute a party's own speech, as opposed to merely paying a candidate's bills. *Colorado-II*, 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). This Court's express holding that it did not reach the own-speech question necessarily decided two things.

First, the mere *fact of coordination* is an insufficient ground under the First Amendment for treating all coordinated expenditures as contributions. If it were sufficient, this Court in *Colorado-II* would not have left open the possibility of a successful as-applied challenge regarding coordinated own-speech communications. Thus, when the decision below said that it could not rule for Plaintiffs because "we would be reaching a conclusion inconsistent with the *Colorado II* Court's teaching that coordinated expenditures may be restricted," App. 34a, it was wrong. *Colorado-II* expressly recognized that the First Amendment may require that some coordinated expenditures not be restricted, specifically those involving a party's own speech, as opposed to merely paying a candidate's bills. By recognizing that potential exception, it did not hold that coordinated expenditures *per se* may be restricted as contributions.

Second, the fact that this Court in *Colorado-II* expressly recognized the as-applied question it left open necessarily means that an as-applied challenge regarding whether some or all coordinated own-speech communications may be treated as contributions is *permitted* and is not actually a *facial* challenge for potentially carving out an exception, whatever the size, to the heretofore general rule that coordinated expenditures may be treated as contributions. So an as-applied challenge may not be rejected on the ground that a favorable ruling on the unresolved own-speech question would effectively overrule *Colorado-II*. Thus, when the decision below insists that Plaintiffs' challenge is really facial because it "rests . . . on the same general principles rejected by the Court in *Colorado II*," and that excluding own-speech coordinated communications

from treatment as contributions "would effectively overrule all restrictions on coordinated expenditures on coordinated expenditures," App. 38a, it was simply wrong.[9]

The decision below makes the same error this Court rejected in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (per curiam) ("*WRTL-I*"). In *WRTL-I*, FEC argued, and the district court held, that the decision facially upholding the prohibition on corporate electioneering communications, *McConnell v. FEC*, 540 U.S. 93,207 (2003), *overruled*, *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) ("*Citizens*"), precluded an as-applied challenge for reasons similar to those asserted here. This Court unanimously reversed, holding that language in a footnote about "'uphold[ing] all applications of the primary definition' of electioneering communications" and the fact of "upholding [the ban] against a facial challenge . . . did not purport to resolve future as-applied challenges." *WRTL-I*, 546 U.S. at 411-12 (quoting *McConnell*, 540 U.S. at 190, n. 73). And in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), the principal opinion noted that "[l]ast Term, we reversed a lower court ruling, arising in the same litigation before us now, that our decision in *McConnell* left 'no room' for as-applied challenges to [the ban]." 551 U.S. at 456 (Roberts, C.J., joined by

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[9] The decision below was *factually* wrong because there remain many coordinated expenditures that would rightly be deemed in-kind contributions because they are in the nature of simply paying a candidate's bills. Any coordinated expenditures paying candidates' bills for polling, printing, rent, utilities, consultants, etc. would be properly considered in-kind contributions. Even paying a candidate's media bills would presumably be an in-kind contribution.

Alito, J.) (citation omitted). *See also id.* at 525 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.) ("*McConnell*'s holding that [the ban] is facially constitutional is overruled."). The arguments rejected in *WRTL-II* must not prevail here.

B. The Constitutionality of Treating as Contributions a Party's Own-Speech Expenditures when Coordination Is Only as to Timing or Otherwise *De Minimis* Is an Unresolved Question.

In addition to the own-speech-as-contribution issue standing alone, also "unresolved" is the question of whether an own-speech communication coordinated only as to timing (or otherwise *de minimis* coordination) may be deemed a contribution. The majority below did not believe that this subset of own-speech communications remained at issue, but for the reasons set out at length in the Jones dissent, App. 49a-82a, and described above, it remains a viable, but unresolved, issue in this case. However, as the Clement dissent explains, a test based merely on timing or other *de minimis* coordination is unsatisfactory and there is strong reason to establish a test for distinguishing all own-speech coordinated communications, App. 82a-88a, which test would subsume the narrow issue of whether the *Cao Ad* must be considered an expenditure because the coordination was only as to timing. But regardless of whether a broader test is established, whether an own-speech ad like the *Cao Ad* that is coordinated only as to timing and states the basis of support for a candidate may constitutionally be treated as a contribution and limited under the First Amendment is a specific question left unresolved in *Colorado-II*. *See* 533 U.S. at 468 n.2 (dissent).

C. The Constitutionality of Limits on Own-Speech, Coordinated Party Expenditures Is an Important Question that this Court Should Decide.

Whether the First Amendment permits a party's own-speech, expenditures to be limited as contributions due to coordination is an important question requiring this Court's resolution. It is important because it implicates this Court's foundational principles of campaign-finance jurisprudence and because political parties' own speech is currently burdened and disadvantaged.

1. The Question Is Important Because It Implicates Foundational Principles of Campaign-Finance Law.

The question presented here is important because it goes to the foundation of this Court's campaign-finance jurisprudence in *Buckley*, 424 U.S. 1.

a. *Buckley* Created the Constitutional Distinction Between Contributions and Expenditures.

The constitutionally significant difference between expenditures and contributions was stated in *Buckley*'s foundational "General Principles" discussion. "[E]xpenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19-20. But contribution limits pose lower First Amendment burdens:

> By contrast . . . a limitation upon the amount that . . . one . . . may contribute to a candidate or political committee entails only a *marginal restriction* upon the contributor's ability to engage in free communication. A contribution serves as

> a *general expression of support for the candidate and his views*, but does not communicate the *underlying basis for the support*. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves *little direct restraint* on his political communication, for it permits the *symbolic expression* of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the *transformation* of contributions *into political debate involves speech by someone other than the contributor*.

Id. at 20-21 (emphases added) (footnote omitted).

b. *Buckley* Provides the Analytical Keys for Protecting "Own Speech" Coordinated Expenditures.

There are two keys to *Buckley*'s foundational analysis that are applicable here. The first is the distinction between a disbursement that is just a "symbolic" or "general expression of support," which is a contribution, and a disbursement that "communicate[s] the underlying basis for the support," which is an expenditure. The second is the related distinction in the last sentence of the block quote, *supra*, which provides a

generally-applicable rule for distinguishing between contributions and expenditures, i.e., does the disbursement fund the payor's own speech to the voters, or does it fund someone else's speech?

This is the foundational analysis to which reference was made in *Colorado-II* regarding the unresolved question of whether a party's coordinated expenditure for a communication containing its own speech could be treated as a contribution. 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). *Buckley*'s fundamental principles of campaign-finance jurisprudence and the First Amendment preclude the possibility that one's own speech constitutionally may be treated as a contribution rather than an expenditure for any reason because it is not someone else's speech, and so full First Amendment free-speech protections for core political speech engage.

c. *Buckley* Required Strict Scrutiny of "Expenditure" Limits, Which Scrutiny Applies to Limits on "Own Speech" Communications.

Buckley only allowed lowered scrutiny for "contributions" because they were not one's own speech, 424 U.S. at 25, so where full First Amendment speech protections apply, as with "expenditures," strict scrutiny applies, *id.* at 44-45. Thus, if a party communication is considered an expenditure, because it is one's own speech, then strict scrutiny applies. In this case, the *Cao Ad* is clearly RNC's own speech, *see infra* Part I.C.1.e, so strict scrutiny must apply to it and materially similar own-speech coordinated party communications. The decision below applied lowered scrutiny because it deemed the *Cao Ad* a contribution automatically by reason of coordination, App. 40a, but that begs

the question presented here, i.e., whether it *may* be treated as a contribution under *Buckley*'s analysis of First Amendment requirements. The Jones dissent applied strict scrutiny because the *Cao Ad* "hews closely to the independent expenditure side of the spectrum," App. 68a, which provides a narrow reason why strict scrutiny must be applied to coordinated party expenditure limits as applied to the *Cao Ad*.

d. A Test for "Own Speech" Is Required.

If coordinated expenditures for own-speech communications may not constitutionally be limited because their fundamental nature requires First Amendment protection, the next question is how to determine what is a party's "own speech." Plaintiffs and the two dissents below created tests, while the majority avoided that central question in this case.

Plaintiffs' Test. Plaintiffs' own-speech test is based on *Buckley*'s foundational principles and has two parts, based on the words "speech" and "own." First, the coordinated expenditure must be for "speech," i.e., it must for a *communication*, as opposed to merely paying a candidate's bills for rent, polling, utilities, and other activities without a communication element, which presumably would always constitute in-kind contributions. Second, the speech must be a party's "own" in the sense that it is *attributable* to the party. That is the commonsense way we usually evaluate speech (such as when the President adopts language written by his speechwriters). Whether speech is attributable to the party may be determined by the content of the communication, e.g., "The RNC wants to thank you for your support in the recent election." Attribution can also be determined by who pays for and adopts the speech. FEC's disclaimer regulations

provide guidance for attribution, following *Buckley*'s focus on who is *paying* for a communication. First, if a political party (e.g., Republican Party of Louisiana) issues an agency letter to another political party (e.g., RNC) for authorized spending (under 2 U.S.C. 441a(d)), it is the party actually paying for the communication that is attributed authorship, i.e., paid for by _____," even if the payor is acting as "the designated agent" for the other party. 11 C.F.R. 110.11(d)(i). Though the Louisiana GOP might approve, have input in, or even author an ad paid for by RNC, if RNC pays for it, the disclaimer must identify RNC as the payor, i.e., it is RNC's own speech, not the state party's. Second, the regulations equate "paid for by" and "made by," so that who makes the payment controls whose "own speech" it is. *See* 11 C.F.R. 110.11(d)(i) ("paid for by"), (ii) ("made by" and "paid for"), (iii) ("paid for by"). Third, the regulations confirm this understanding in the non-political-party context by requiring the payor to be listed in the disclaimer, even where a communication is "authorized by a candidate . . . but is paid for by any other person," 11 C.F.R. 110.11(b)(1)-(3). So authorization is merely approval: it does not convert a payor's own speech into the candidate's speech.

Plaintiffs set out a test to determine "own speech," which they believe is a common-sense, analytically sound approach to determining to whom the speech is attributable and is consistent with FEC's own regulations assigning attribution credit for a communication. The majority below saw no need to establish an "own speech" test because it decided that *Colorado-II* precludes such a challenge: "If this court were to accept Plaintiffs' exceedingly broad argument, we would be reaching a conclusion inconsistent with . . . *Colorado*

II's . . . teaching that coordinated expenditures may be restricted." App. 34a. Consequently, the majority decided that Plaintiffs here presented an "exceedingly broad argument," not the "as-applied challenge" left open by *Colorado-II*, App. 34a, 37a, because "Plaintiffs' 'own speech' argument would effectively eviscerate" *Colorado-II*. App. 33a. But Plaintiffs did not present a second facial challenge or one based on hypothetical facts. They presented an as-applied challenge with specific facts, including a very specific ad precisely of the sort described in *Colorado-II* as presenting an open question. The fact that Plaintiffs then presented their analysis of where the "own speech" line should be drawn may not be used against them, as the majority did below, to reject the precise as-applied challenge that this Court expressly left open.

Jones Dissent Test. The "test" proposed by the Jones dissent below protects "own speech" in a limited context. It would apply strict scrutiny where an ad "hews closely to the independent expenditure side of the spectrum," App. 68a, and would hold that where the only coordination is *de minimis* and "[w]ithout some link of candidate control or influence, neither the *quid pro quo* corruption nor appearance of corruption that justifies contributions limits can occur," App. 73a (Jones, C.J., joined by Smith, Clement, Elrod & Haynes, JJ.). "Consequently the First Amendment prohibits treating an ad like the *Cao Ad* as a contribution by reason of coordination, App. 70a-79a. The Jones dissent's analysis is transferable to other *de minimis* coordination scenarios because the government will similarly be unable to meet its burden of justifying the coordinated expenditure limits under the applicable scrutiny.

Clement Dissent Test. The own-speech test proposed by the Clement dissent is a "content-driven" "two-pronged standard" to determine when coordinated expenditures may be treated as a contribution: "An advertisement is functionally identical to a contribution only if it is susceptible of no other reasonable interpretation than as a general expression of support for the candidate, *and* the ad was not generated by the candidate." App. 85a (emphasis in original). This dissent also pointed out the deficiencies of a "timing alone" or "*de minimis* standard." App. 83a.

Which of these tests satisfies the First Amendment is an important question that this Court should decide because it is a foundational but undecided question of campaign-finance jurisprudence. Or the Court may need to fashion yet another test to satisfy First Amendment requirements. But some constitutional line is required because parties' own-speech coordinated communications are currently being treated and limited as contributions, which is impermissible under the First Amendment as interpreted by this Court in *Buckley*, 424 U.S. 1.

e. The *Cao Ad* Is RNC's Own Speech.

Under any of the "own speech" tests set out in this case, the *Cao Ad* is clearly RNC's own speech. It is attributable to RNC by its content and would bear a disclaimer showing that RNC paid for the ad. It communicates the underlying basis for the support and is not merely a general expression of support for the candidate and his views, i.e., it is not merely a symbolic expression of support. *De minimis* coordination with Rep. Cao as to timing would in no way alter the fact that this ad is RNC's own speech. The ad is plainly more in the nature of a party's own speech than in the

nature of merely paying a candidate's bills. Disbursements for it should be considered expenditures, not contributions.

f. FEC Did Not Show a Sufficient Anti-Corruption Interest to Regulate RNC's "Own Speech."

The only interest justifying limitations on contributions is preventing corruption or its appearance. *Buckley*, 424 U.S. at 26-27. In *Citizens*, 130 S.Ct. 876, this Court emphatically dismissed the government's fall-back arguments regarding corruption interests. It rejected *any* corruption interest beyond *quid pro quo* corruption. *Id* at 909-10. "Ingratiation and access . . . are not corruption." *Id.* at 910. *Citizens* stated that evidence showing "that speakers may have influence over or access to elected officials does not mean these officials are corrupt" and "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy." *Id.* at 910.

And no anti-circumvention argument relying on access and gratitude justifies restriction. *Colorado-II* justified the Party Expenditure Provision Limits as a means to prevent circumvention.[10] But if the First

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[10] 533 U.S. at 465 ("We hold that a party's coordinated expenditures . . . may be restricted to minimize circumvention . . . ."). As to other alleged "corruption," the Court found it unnecessary to reach FEC's arguments based on "*quid pro quo* arrangements and similar corrupting relationships between candidates and parties themselves." *Id.* at 456 n.18. However, the Tenth Circuit had rejected FEC's arguments not reached, *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1229-31 (10th Cir. 2000), as it had rejected the circumvention argument, *id.* at 1231-32. And the district court found no factual evidence of

Amendment mandates that parties' "own speech" be treated as "expenditures," the circumvention argument fails as a matter of law because only "contributions" may be limited, not expenditures. And the "own speech" issue was expressly left open despite *Colorado-II*'s holding "that a party's coordinated expenditures . . . may be restricted to minimize circumvention," 533 U.S. at 465. Thus, potential "circumvention" did not foreclose the "own speech" question.

Moreover, Plaintiffs do not engage in the "tallying" identified as problematic in *Colorado-II*, *id.* at 459. *See Deposition of Thomas Josefiak* at 42:11-43:1. And the *Colorado-II* dissenters had strong arguments against any circumvention interest in this context, 533 U.S. at 474-480, and for narrowly-tailored approaches if corruption were proven, *id.* at 581-82. In this as-applied challenge, FEC has been unable to provide evidence of corruption, as defined in *Citizens*, or even of the type of corruption contemplated by *Colorado-II*.

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quid pro quo corruption between parties and candidates. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F.Supp.2d 1197, 1211-12 (no evidence of corruption in the form of contributors "forc[ing] the party committee to compel a candidate to take a particular position"), 1212-13 (no "corruption" from political parties' influence over candidates because "decision to support a candidate who adheres to the parties' beliefs is not corruption"), 1213 ("FEC has failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof.") (D. Colo. 1999). Here, FEC has again failed to provide evidence of corruption. So there is no *quid pro quo* corruption, and there can be no "*appearance* of corruption" where the alleged "corruption" is *absent*.

In sum, the unresolved issue of whether a party's coordinated expenditures for its own speech may be treated and limited as contributions is clearly presented and involves the most foundational analysis of campaign-finance jurisprudence, i.e., the constitutional difference between a contribution and an expenditure. The analysis of how to state a test for "own speech," i.e., where on the spectrum of coordinated expenditures to recognize protection for a party's own speech, was begun by Plaintiffs and two dissenting opinions. This petition should be granted to finish that analysis.

2. The Question Is Important Because Political-Party Speech Is Burdened and Disadvantaged.

The own-speech question is also important because the current independent-expenditure regime, which is necessitated by the coordinated expenditure restrictions, burdens and disadvantages the First Amendment political-speech rights of parties.

a. Because of the Need to Avoid Coordination, RNC's Independent Expenditures Cannot Truly Be Its Own Speech.

A political party may do an "independent expenditure" that is supposed to be its "own speech," for which it is responsible, for which it may be criticized, and yet be surprised and unhappy because, until the communication is released, the party officials have no idea what it will say. This is because the nature of the relationship between the party and the candidate forecloses the opportunity for an "independent expenditure" to be a party's "own speech."[11]

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[11] A district court finding of fact shows why the independent-expenditure option does not sufficiently protect

Primarily, prior contacts between the party and the candidate ruin the opportunity for independent expenditures. A party must "worry about whether or not a conversation that took place with a member of Congress . . . was actually going to taint their ability to do an independent expenditure." *Deposition of Thomas Josefiak* at 57:16-58:1.

Additionally, party chairmen "really have no control over what the message is." *Id.* at 58:2-5. "[T]hrough an [i]ndependent [e]xpenditure [p]rogram, the [RNC] chairman . . . has no control over the message, but, then bears full responsibility for what the message is, even though the first time he sees that message is when everyone else sees it." *Id.* at 58:7-11. "[T]he idea that the [RNC] chairman . . . cannot control what

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RNC's free speech right:

> 49. Because the RNC has a continuous and ongoing relationship with its candidates, special measures must be taken to do independent expenditures regarding its candidates. . . . [T]he RNC may hire an outside consulting group . . . but . . . the RNC . . . may have . . . [no] involvement in the independent expenditure in order for it to be truly independent. . . . [T]he RNC . . . has . . . [no] control over the message of an independent expenditure yet the RNC bears responsibility for that message. The RNC makes its independent expenditures in this way out of a belief that there is no way to have a true "firewall policy." . . .

App. 119-20a. Creating a firewall requires isolating certain staff from all information that might trigger coordination in order to do the independent expenditures. But this cannot involve key party officials, who must maintain contact with candidates.

message the RNC is putting out through an [independent expenditure] [p]rogram has been very troublesome." *Id.* at 58:12-15.

Under the current system, "the only thing the chairman approves is what the budget is for independent expenditures." *Id.* at 59:1-3. That money goes to "individual consulting groups that have no connection . . . with [a candidate's] campaign in order to treat it as truly independent . . . . *Id.* at 59:4-8. The chairman would not be independent from the candidate's campaign because, by nature of the office, he or she "is going to have communications with campaigns, and as a result, could never, never be involved with . . . any sort of [i]ndependent [e]xpenditure [p]rogram." *Id.* at 59:9-13. Nor are other RNC officials allowed to be involved because the program must be conducted in "total isolation from any employee of the RNC in any engagement with an independent expenditure operation, save the counsel's office," which would only assure legal compliance as to disclaimers and the like. *Id.* at 59:14-22. Thus, "no one at the RNC" would have any "control over the content" or "see an independent expenditure until everyone else did when it hit the air waves." *Id.* at 60:2-5.

Therefore, RNC's "own speech" in the form of independent expenditures currently must be written by "outside consultants," who "are hired to write the scripts, take their own polls, do their own research, and decide on their own what the message is going to be." *Id.* at 60:15-18. As a general rule, then, independent expenditures are employed only when there is "no other way" to have an impact on a race. *Id.* at 61:2-16.

b. Independent Expenditures Do Not Adequately Protect Parties' First Amendment Speech Right.

In *Citizens*, this Court decided that "the option to form PACs d[id] not alleviate the First Amendment problems with [the ban on corporate electioneering communications]," 130 S.Ct. at 897, because of the burdens of PAC compliance, *id.* at 897, and the fact that "PACs . . . must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign," *id.* at 898. This analysis is applicable here because similar problems arise with respect to parties' ability to engage in their own speech through independent expenditures. Just as the PAC-option did not adequately protect corporations' right to engage in their own core political speech, the independent-expenditure-option does not adequately protect the right of political parties to engage in their own core political speech.

Treating parties' coordinated "own speech" expenditures as "contributions" is especially problematic because the rules restricting how *parties* can make independent expenditures render such independent expenditures ineffective in advancing s parties' "own speech." Representative Cao explained that the National Republican Congressional Committee ("NRCC") had made some "robocalls" as independent expenditures that "were so . . . badly done and . . . counterproductive that we wanted them to stop." *Deposition of Anh "Joseph" Cao* at 34:8-12. "[W]e wanted them to stop because it was hurting us more than it helped us." *Id.* at 34:17-19. Then-candidate Cao needed Democratic

votes in a heavily Democratic district, but the calls attacked the Democratic party, which alienated potential Democratic voters for Cao. *Id.* at 35:1-21. The underlying problem, Cao said, was that "none of them discussed to me those independent expenditures because we were not allowed to . . . ." *Id.* 34:2-4. Had NRCC been allowed to consult with the Cao campaign, NRCC could have ensured that its "own speech" was helpful, not harmful.

c. RNC's Goals Cannot Be Accomplished Through Independent Expenditures.

Coordinating with candidates not only promotes "efficiency from the ability to raise and spend resources, but, also in getting a message out and giving more information out there to the electorate to make judgment calls." *Id.* at 155:9-13. Coordination allows RNC "[t]o be cohesive in the message," and to "get its speech out there . . . in addition to what the candidate may want to say . . . ." *Id.* at 156:5-9. This is important to assure that the public knows that party affiliation "means something." *Id.* at 156:10-15. And it is important in light of the need to assure that political parties are not disadvantaged in comparison to newly-liberated corporations, unions, PACs, and other special interest groups. *See* Part I.C.1.d.

Furthermore, RNC was unable to do the *Cao Ad* as an independent expenditure because "the ability to even do an independent expenditure at that point in time was difficult." *Id.* at 157:9-13. One reason it was difficult is because the independent expenditure scheme requires "a system that had not been in place," and there was no "time to put it all in place." *Id.* at 157:14-16. Another reason was that RNC could not have written the *Cao Ad* if it were an independent

expenditure because, to create the necessary independence, "this would have had to have been through an outside consultant that would have had to have written this and we wouldn't have had control of the message and it probably would have looked very different than what our message was." *Id.* at 157:17-158:3.

At the time RNC wanted to speak through the *Cao Ad*, it was not practically possible to firewall off RNC staff in order to do an independent expenditure because that "would have had to have started at the beginning of an election cycle." *Id.* at 159:1-12. "And that person would have no communications whatsoever and you sit around there for a year and a half doing nothing and waiting to do independent expenditures and eating resources up for other employees," so "that, as a practical matter, it just doesn't work that way." *Id.* at 159:13-18.

Under the current system, RNC cannot even tell a paid outside consultant the topic on which it wants to speak without destroying the independence of the expenditure. *Id.* at 171:1-20. And even if, for example, one were able to find a consultant that only worked on one issue, "once you hire them . . . , you can't tell them which way to talk about the issue . . . pro or con, or even if they took the same position on pro or con, you wouldn't be able to hone in on what that message was, it would be totally left up to them." *Id.* at 172:2-14.

Allowing a party to express its "own speech" only through "independent expenditures" is a special burden on free speech. "It's the RNC's speech and if the RNC isn't able to say what it really wants to say, and the way it wants to say it, that is a burden and that is a problem." *Id.* at 73:18-21. And it would not be enough

to fix the problem "[i]f coordination regulations were written in such a way to allow the chairman to have control over the script." *Id.* at 73:22-74:2. This is so because "it would not meet the definition of an independent expenditure because that same chairman will have had conversations with the state parties, with the campaigns." *Id.* at 74:4-10. The chairman still has a problem even if "the discussion were not about a particular coordinated expenditure," but rather "about everything but this one particular coordinated expenditure" because "no one is going to believe that they didn't talk about it." *Id.* at 74:16-75:9. This results in a chill. *Id.* at 75:10-12. "[A]rchetypical political speech . . . [should not] be chilled . . . . '"First Amendment freedoms need breathing space to survive."'" *Citizens*, 130 S.Ct. at 892 (citations omitted).

The First Amendment requires that political parties be able to coordinate with their candidates to fully engage in their "own speech." The "independent expenditure" option is inadequate to protect this right.

d. Parties Should Be Favored but Are Now Disfavored as to Free Speech.

Political parties have long had a favored status for allowing citizens to advance "common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). A "political party's independent expression . . . reflects its members' views about the philosophical and governmental matters that bind them together." *Id.* at 615 (Breyer, J., joined by O'Connor and Souter, JJ.). So they have a "unique role in serving" the principles of the First Amendment, *Colorado-I*, 518 U.S. at 629 (Kennedy, J., concurring, joined by Rehnquist, C.J., and Scalia, J.), and political party expression is protected "'core' political speech."

Id. at 616 (citation omitted).

Because political parties bear directly on an individual's right of association, political parties have historically been given special protections. For example, the First Amendment protects a party's primaries, *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (describing constitutional importance of associating in political parties to elect candidates), internal processes, *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 230 (1989) (including how a party chooses to "organize itself, conduct its affairs, and select its leaders"), and rights of association generally, *Tashjian v. Rep. Party of Conn.*, 479 U.S. 208, 224 (1986) ("The Party's determination of the . . . structure which best allows it to pursue its political goals[] is protected by the Constitution"); *Randall v. Sorrell*, 548 U.S. 230, 256 (2006).

But other entities have recently been afforded more free-speech protection than parties. Despite the unique, vital role of parties, all corporations and unions can now use non-federal funds for independent expenditures, while political parties remain limited to federal funds (i.e., funds received subject to federal source-and-amount limits). *See Citizens*, 130 S.Ct. 876. Even beyond the activities *Citizens* permits, corporations may also solicit and spend non-federal funds for grassroots lobbying, for example, while RNC may not. Political parties are similar to corporations or unions in that they are all citizens groups, but parties are unique in that they speak directly for members as an embodiment of collective political beliefs. Justice Breyer noted the harm of disadvantaged parties during the *Citizens* oral argument:

> Suppose we overrule these two cases. Would that leave the country in a situation where corporations and trade unions can spend as much as they want in the last 30 days on television ads . . . but political parties couldn't, because political parties can only spend hard money on this kind of expenditure? And therefore, the group that is charged with the responsibility of building a platform that will appeal to a majority of Americans is limited, but the groups that have particular interests, like corporations or trade unions, can spend as much as they want?

Tr. Oral Arg. at 22 (available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf.).

After *Citizens*, the District of Columbia Circuit held that the First Amendment prohibits limiting contributions to a political committee organized under section 527 of the Internal Revenue Code that only makes independent expenditures. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010). FEC adopted this holding as nationwide policy. *See* FEC, Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten). So express-advocacy-only groups, receiving unlimited contributions, played a prominent role in the 2010 general election. *See, e.g.*, Jonathan D. Salant & Traci McMillan, *Karl Rove, Republican-Leaning Groups Amass Winning Record in 2010 Midterms* (Nov. 3, 2010)(available at http://www.bloomberg.com/news/2010-11-03/karl-rove-republican-leaning-groups-amass-winning-record-in-2010-midterms.html). Political parties, limited in the amount of contributions they may receive, simply cannot compete with the myriad advocacy groups now competing in the public square

with their own core political speech.

This downgrading of the relative power of political parties led the court in *EMILY's List* to point out the historical anomaly of other groups' advantages over parties. *EMILY's List v. FEC*, 581 F.3d 1, 19 (D.C. Cir. 2009). Here a first step may be taken to rectify the imbalance by recognizing the First Amendment right of political parties to coordinate their own-speech communications with their candidates without having their expenditures limited as if they were contributions.

In sum, the unresolved issue of whether a party's coordinated expenditures for its own speech may be treated and limited as contributions is an important question that this Court should decide because of the substantial negative effects on parties of the current scheme. This case presents an opportunity to enhance the relative power of political parties by simply applying the First Amendment and following *Buckley*'s foundational analysis.

II. The Decision Below Conflicts with *Buckley* and *Colorado-II*.

A second basis on which this Court grants certiorari is whether a decision below conflicts with a decision of this Court. Sup. Ct. R. 10. This conflict exists here as discussed more thoroughly in the context of the discussion above.

The decision below conflicts with *Buckley*, which clearly set out the constitutional distinction between expenditures and contributions, 424 U.S. at 19-21, which foundational distinction does not permit treating parties' coordinated expenditures for communications containing their own speech as contributions that may be limited under lowered scrutiny. *See supra* at 16-18.

And the decision below conflicts with *Colorado-II*, which expressly left open—and thus clearly did not *preclude*, as the decision below held, App. 34a-38a—an as-applied challenge regarding whether the First Amendment permits treating parties' coordinated expenditures that comprise their own speech as contributions that may be limited under lowered scrutiny. 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). In recognizing the open question, this Court in *Colorado-II* necessarily decided that the mere *fact* of coordination as to "own speech" expenditures does not require that they be deemed contributions as the decision below held. App. 34a, 38a.

In sum, this petition should also be granted because the decision below conflicts with decisions of this Court.

Conclusion

For the reasons stated, this petition should be granted.

Respectfully submitted,

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[***Editor's Note:*** *Page numbers from the reported citation, 619 F.3d 410 [*], and the unreported opinion [**] are indicated.*]

[Filed September 10, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re: ANH CAO, et al., Plaintiffs-Appellants,	)	
v.	)	Civil Action Nos. 10-30080 10-30146
FEDERAL ELECTION COMMISSION, Defendant-Appellee.	)	

On Certification and Appeal from the United States District Court for the Eastern District of Louisiana.

The challenges raised in the present case require this court to decide whether certain provisions of the Federal Election Campaign Act ("FECA" or [**2] "the Act") of 1971, 2 U.S.C. § 431 *et seq.*,[1] violate the [*414] Plaintiffs' right to free speech under the First Amendment. Applying Supreme Court precedent, we conclude

[1] As amended by the Bipartisan Campaign Reform Act ("BCRA") of 2002, Pub.L. No. 107-155, 116 Stat. 81 (2002).

that each of the challenged FECA provisions constitutes a constitutionally permissible regulation of political parties' campaign contributions and coordinated expenditures. Accordingly, we find that none of the challenged provisions unconstitutionally infringe upon the rights of the Plaintiffs to engage in political debate and discussion.

I.

Plaintiff Anh "Joseph" Cao is the United States Representative for the Second Congressional District of Louisiana, and Plaintiff Republican National Committee ("RNC") is the national political party committee of the Republican Party.[2] On November 13, 2008, just before the December 6, 2008 election, the Plaintiffs filed a suit for declaratory judgment,[3] asserting eight constitutional challenges to various provisions of FECA. Generally, the Plaintiffs challenge the statutory provisions limiting the RNC's contributions to, and expenditures made in coordination with, Cao's 2008 congressional campaign. The district court, abiding by its proper role in addressing a 2 U.S.C. § 437h challenge,[4]

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[2] Initially, the Republican Party of Louisiana ("LA-GOP") was also a Plaintiff to the action. The district court, however, determined that the LA-GOP did not have standing under 2 U.S.C. § 437h. No party has appealed this portion of the district court's order. Accordingly, the LA-GOP is no longer a party to the case now before the court.

[3] Plaintiffs' complaint raises claims under the First and Fifth Amendments, FECA, 2 U.S.C. § 437h, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

[4] Section 437h provides:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute

identified the constitutional issues in the complaint, held [**3] evidentiary hearings concerning those issues, and made necessary findings of fact. *See Khachaturian v. FEC,* 980 F.2d 330, 332 (5th Cir.1992) (en banc). In doing so, the district court began by discussing the general contribution and expenditure limitations FECA places on political parties. *Cao v. FEC,* 688 F.Supp.2d 498, 508-17 (E.D.La.2010) ("*Cao* (*District Court*)"). Specifically examining how FECA affected the RNC's contributions and expenditures related to the 2008 Cao campaign, the district court then found that the RNC spent all of the $42,100 it was allowed to spend on coordinated expenditures under the Party Expenditure Provision, 2 U.S.C. § 441a(d)(2)(3),[5]

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such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

[5] Section 441a(d)(2)(3) states:
(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

and reached its $5,000 [**4][*415] contribution limit under § 441a(a)(2)(A).[6] *Id.* at 532. Additionally, the district court found that the RNC would have spent additional money on speech expressly advocating the election of Cao had it been permitted to spend beyond FECA limitations. *Id.* at 532-33.

Upon hearing the evidence and making the necessary findings of fact, the district court evaluated the Plaintiffs' eight constitutional challenges and, pursuant to § 437h, certified four questions to this en banc court. *Id.* at 549. The district court dismissed the

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(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds–

(A) in the case of a candidate for election to the office Senator, or of Representative from a State which is entitled to only one Representative, the greater of–

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

[6] Section 441a(a)(2)(A) states that "(2) No multi candidate political committee shall make contributions–(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000 . . . ."

Plaintiffs' remaining four challenges as frivolous. *Id.* Subsequently, the Plaintiffs appealed the district court's dismissal of the non-certified, frivolous questions. For purposes of judicial economy and efficiency, we consolidated the Plaintiffs' appeal of the dismissal of the non-certified questions with the court's en banc consideration of the certified questions.

We review the constitutionality of questions certified pursuant to § 437h *de novo*. *See Goland v. United States*, 903 F.2d 1247, 1252 (9th Cir.1990). We review the district court's dismissal of the Plaintiffs' remaining claims as frivolous for abuse of discretion. *Id.*

II.

This appeal requires us to address the intersection of congressional campaign finance reform with the fundamental right to free speech under the First Amendment. Since the landmark decision of *Buckley v. Valeo*, 424 U.S. 1, [**5] 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court on a number of occasions has evaluated the limitations that the First Amendment imposes on the Government's ability to preserve the integrity of the democratic election process through its regulation of campaign expenditures and contributions made to federal candidates. As such, many of the Plaintiffs' constitutional challenges raise questions the Supreme Court has previously addressed. Thus, we begin our analysis with a brief examination of the constitutional contours in which we find ourselves.

In *Buckley*, the Supreme Court determined that FECA's "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 14, 96 S.Ct. 612. The *Buckley* Court declared that the "[d]iscussion of public issues and debate on the qualifications of candidates

are integral to the operation of the system of government established by our Constitution." *Id.* As a result, the *Buckley* Court applied a strict level of scrutiny to the Government's restrictions "on the amount of money a person or group can spend on political communication during a campaign [since such restrictions] necessarily reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19, 96 S.Ct. 612.

[*416] Although the *Buckley* Court recognized that FECA's limitations implicate important First Amendment concerns, the Supreme Court's application of strict scrutiny did not result in the invalidation of all of FECA's regulations. *See id.* at 19-21, 96 S.Ct. 612. Instead, the *Buckley* Court determined that some governmental intrusions on an individual's (or political party's) First Amendment right to make financial contributions to a candidate's campaign were warranted based on the Government's compelling interest to prevent corruption in the election of federal officials. *Id.* at 20-21, 26-27, 96 S.Ct. 612. The Court reasoned that:

> To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity [**6] of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Id. at 26-27, 96 S.Ct. 612.[7] The *Buckley* Court recognized that FECA's contribution limits were Congress' response to the rising levels of corruption in the election of public officials. *Id.* at 26, 96 S.Ct. 612. Consequently, the Court found that the governmental interest in preserving the integrity of our democratic system was paramount. *Id.* at 27, 96 S.Ct. 612.

In addition to articulating the compelling governmental interest for FECA's limitations on campaign contributions, the *Buckley* Court also articulated the constitutional distinction between FECA's regulations of *contributions* and *expenditures,* concluding that courts must apply a greater degree of constitutional scrutiny to FECA's regulations of expenditures. *See id.* at 23, 96 S.Ct. 612. The Court determined that FECA's regulations on expenditures placed greater restrictions on First Amendment rights because they "represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech," and consequently, the Court applied a more exacting degree of constitutional scrutiny to expenditure limitations. *Id.* at 19, 47-48, 96 S.Ct. 612. The Court further distinguished the Government's regulation of contributions from its regulation of expenditures, reasoning that "[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20, 96

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[7] In addition to actual corruption, the *Buckley* Court found that the Government had a compelling interest in preventing the appearance of corruption. *Id.* at 27, 96 S.Ct. 612.

S.Ct. 612. Accordingly, the *Buckley* Court recognized that the level of constitutional scrutiny for contribution [**7] limitations was less than the level of constitution scrutiny applied to limitations on expenditures. *See id.* at 29, 35, 38, 96 S.Ct. 612.

In further articulating the constitutional distinction between contributions and expenditures, the Court carefully distinguished *independent* expenditures from those expenditures that are "prearranged or coordinated" with a particular candidate. *Id.* at 46-47, 96 S.Ct. 612. Following the terminology used in FECA, the *Buckley* Court considered that for purposes of First Amendment scrutiny, "prearranged or coordinated expenditures" are constitutionally equivalent to contributions. *Id.* at 46, 96 S.Ct. 612. According to the Court, it followed that coordinated expenditures are subject to the same limitations [*417] and scrutiny that apply to contributions. *Id.* at 47, 96 S.Ct. 612. Although the facts of the challenge and nature of the Court's analysis in *Buckley* gave the Court no reason to specifically address the level of scrutiny for coordinated expenditures, the *Buckley* Court implicitly recognized that limitations on coordinated expenditures would be, like contribution limitations, subject to a lower level of constitutional scrutiny than limitations on independent expenditures.

The *Buckley* Court's distinction between coordinated expenditures (or contributions) and independent expenditures was reaffirmed in *California Medical Ass'n v. FEC,* 453 U.S. 182, 195, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981), when the Court explained that "[t]he type of expenditures that this Court in *Buckley* considered constitutionally protected were those made *independently* by a candidate, individual, or group in

order to engage directly in political speech." *Id.* (citation omitted) (emphasis added). In cases thereafter, the Court continued to recognize the distinction between a speaker's First Amendment right to make independent versus coordinated expenditures, and the degree to which lower courts must balance these rights with the Government's compelling interest to prevent corruption in the democratic elections of our public officials. *E.g., Colorado Republican Fed.* [**8] *Campaign Comm. v. FEC,* 518 U.S. 604, 613, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) ("*Colorado I*"); *FEC v. Colorado Republican Fed. Campaign Comm.,* 533 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) ("*Colorado II*").

With this legal landscape in mind, we begin our examination of the Plaintiffs' constitutional challenges by first examining the questions the district court found to be frivolous.

A. Frivolous Questions

1.

The district court did not certify the Plaintiffs' second and fifth questions in their complaint, which raise clearly related issues. *Cao* (*District Court*), 688 F.Supp.2d at 535-39. The Plaintiffs' second question reads as follows:

> Do the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(2)(3) violate the First and Fifth Amendment rights of one or more plaintiffs in that they are excessively vague, overbroad, and beyond the authority of Congress to regulate elections as applied to coordinated expenditures other than (a) communications containing express advocacy, (b) targeted federal election activity, (c) disbursements

> equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature?

Id. at 504. The Plaintiffs' fifth question reads as follows:

> Do the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and the Coordinated Contribution Provision at 2 U.S.C. § 441a(a)(7)(B)(i) (treating coordinated expenditures as in-kind "contributions") violate the First and Fifth Amendment rights of one or more of the plaintiffs in that they are excessively vague, overbroad, and beyond the authority of Congress to regulate elections as applied to coordinated expenditures other than (a) communications containing express advocacy, (b) targeted federal election activity, (c) disbursements equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature?

Id.

[**9] The Plaintiffs assert that §§ 441a(d)(2)(3), 441a(a)(2)(A), and [*418] 441a(a)(7)(B)(i)[8] reach speech that is not "unambiguously campaign related," and therefore, the provisions are overbroad and vague in violation of the Supreme Court's decision in *Buckley*. *See Buckley*, 424 U.S. at 81, 96 S.Ct. 612. We do not agree.

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[8] Section 441a(a)(7)(B)(i) states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate . . . ."

FECA must be read in light of the FEC regulations that implement the statute. Expenditures for a "party coordinated communication," as defined by 11 C.F.R. § 109.37, are restricted to those which qualify as coordinated expenditures that may be regulated under the Constitution as contributions. In other words, the FEC regulations make it clear that a "party coordinated communication" only encompasses speech that is campaign-related.[9] Thus, § 109.37 limits the breadth of communications to which §§ 441a(d)(2)(3), 441a(a)(2)(A), and 441a(a)(7)(B)(i) apply. Therefore, the Plaintiffs' argument that these statutory provisions reach speech that is not campaign-related is without merit. *Buckley* does not permit non-campaign-related speech to be regulated.

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[9] Section 109.37 defines "party coordinated communications" as those communications that are (1) paid for by the party, (2) satisfy a particular content standard, and (3) coordinated with the candidate as defined by § 109.21(d)(1)(6). The content standards set forth in § 109.37 require that the communication be either "[a] public communication that disseminates, distributes, or re-publishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing," or "[a] public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office," or a "public communication [that] refers to a clearly identified House or Senate candidate and is publicly distributed . . . in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus." Section 109.37(a)(2)(iii)(B) provides a similar 120 day time period for public communications referring to a Presidential or Vice Presidential candidate.

> In *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court, invoking constitutional avoidance, [**10] construed FECA's limitation on expenditures to apply only to funding of communications that "express [ly] . . . advocate the election or defeat of a clearly identified candidate for federal office," i.e., those that contain phrases such as " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.' " *Id.* at 43-44 & n. 52, 96 S.Ct. 612.

Shays v. FEC, 528 F.3d 914, 917 (D.C.Cir.2008). The FEC regulations make abundantly clear that the only coordinated expenditures captured by the statutory reach of FECA are campaign-related expenditures which *Buckley* recognized that Congress could regulate as contributions.

Plaintiffs argued to the district court that the FEC's promulgation of the above regulation constitutes an acknowledgment that some line exists between speech which may be regulated and speech which may not be regulated. *See Cao* (*District Court*), 688 F.Supp.2d at 536. This acknowledgment, Plaintiffs argued, "demonstrates a constitutionally deficient ambiguity in the current statutory language." *Id.* We know of no authority, and Plaintiffs cite to no authority, that requires the content of FEC regulations be included in statute or that prohibits a statute's reach to be narrowed by regulations. Accordingly, we find that the district court did [*419] not abuse its discretion in denying the certification of the Plaintiffs' second and fifth questions.

2.

The district court also found the Plaintiffs' fourth question frivolous and denied its certification. *Cao*

(*District Court*), 688 F.Supp.2d at 542-43. The Plaintiffs' fourth constitutional challenge reads as follows:

> Do the limits on coordinated expenditures at 2 U.S.C. § 441a(d)(3) violate the First Amendment rights of one or more plaintiffs? (a) Do all but the highest limits violate such rights because any lower rates are unsupported by the necessary anti-corruption interest? (b) Is 2 U.S.C. § 441a(d)(3) facially unconstitutional because lower rates cannot be severed from higher rates and the voting-age-population formula is substantially overbroad and inherently unconstitutional? [**11] (c) Is the highest limit for expenditures coordinated with Representatives unconstitutionally low?

Id. at 504.

The Plaintiffs argue that the multiple limits contained in § 441a(d)(3) mean that the Congress acknowledges that the higher limits are sufficient to accommodate any interest in preventing corruption, and thus the lower limits are automatically unnecessary to advance that anti-corruption interest.[10] This argument leads the Plaintiffs to conclude that any lower limits within a multiple-limit scheme are inherently unconstitutional.

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[10] For example, under § 441a(d)(3), the RNC may make expenditures of up to $20,000 in connection with a candidate for U.S. Senate, but may only make expenditures of up to $10,000 in connection with a candidate for the U.S. House of Representatives. Plaintiffs argument is that because § 441a(d)(3)(A)(ii) allows for expenditures of up to $20,000 for Senate candidates, the $10,000 restriction for House candidates is unconstitutionally low.

The Supreme Court rejected this argument in *Buckley* when the Court declared that "Congress' failure to engage in such fine tuning does not invalidate the legislation." *Buckley,* 424 U.S. at 30, 96 S.Ct. 612. Although there may be variances within a statute's limitations on contributions or expenditures, so long as the Government can establish "that some limit . . . is necessary, a court has no scalpel to probe . . . ." or parse through the varying degrees of limitations. *Id.* (quotations and citations omitted). "In practice, the legislature is better equipped to make such empirical judgments, as legislators have [the] 'particular expertise' " necessary to assess what limits will adequately prevent corruption in the democratic election of their peers. *Randall v. Sorrell,* 548 U.S. 230, 248, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006).

Plaintiffs also assert that § 441a(d)(3) is unconstitutional because the limitations imposed on contributions to different candidates vary depending on the voting age population in their respective districts. This challenge is similarly frivolous as it is foreclosed by *Nixon v. Shrink Missouri Government* [**12] *PAC,* 528 U.S. 377, 382, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000), in which the Court upheld the constitutionality of a "statute impos[ing] contribution limits ranging from $250 to $1,000, depending on specified state office or size of constituency."

Finally, in regards to the Plaintiffs' challenge that the highest limit for expenditures coordinated with Representatives is unconstitutionally low, the Plaintiffs have failed to provide the court with any evidence upon which we could conclude that the limits impose too stringent of a burden on political speech. *See Buckley,* [*420] 424 U.S. at 21, 96 S.Ct. 612 (explaining

that whether a contribution limitation is unconstitutionally low in part depends on whether the limitation prevents the candidate from "amassing the resources necessary for effective [campaign] advocacy . . .."); *see also Khachaturian,* 980 F.2d at 331 ("To present a colorable constitutional question in [an] as applied challenge, [the Plaintiff] must demonstrate that the [Act's] limit had a serious adverse effect on the initiation and scope of his candidacy."). Thus, in arguing that the challenged limits are unconstitutionally low, the Plaintiffs have failed to provide evidence demonstrating that the limits preclude federal candidates from effectively amassing the resources necessary to wage an effective campaign.[11]

Consequently, we find that the district court did not abuse its discretion in finding the Plaintiffs' fourth question frivolous.

3.

Although the district court certified question 8(a), it found 8(b) and 8(c) to be frivolous. Plaintiffs offer no argument or authority in their briefs to assert that the district court erred in dismissing question 8(b). "When an appellant fails to advance arguments in the body of its brief in support of an issue it has [**13] raised on appeal, we consider such issues abandoned." *Justiss Oil Co., Inc. v. Kerr-McGee Refining Corp.,* 75 F.3d 1057, 1067 (5th Cir.1996). Accordingly, we find the

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[11] Quite to the contrary, the evidentiary record reveals that Cao has had no difficulty amassing an impressive amount of resources for his campaigns. During the 2008 cycle, then-candidate Cao's congressional campaign had receipts of $242,531. As of June 30, 2009, he had reported $516,957 in total receipts.

Plaintiffs have waived their appeal of question 8(b).

> The Plaintiffs' eighth question in 8(c) states:
>
> Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) facially violate the First Amendment rights of one or more plaintiffs [because] . . . (c) [t]he limit is simply too low to allow political parties to fulfill their historic and important role in our democratic republic?

Cao (*District Court*), 688 F.Supp.2d at 504.

The Plaintiffs contend that § 441a(a)(2)(A)'s $5,000 contribution limitation is unconstitutionally low because it prohibits political parties from fulfilling their historic role in "our democratic republic." While the Plaintiffs offer powerful rhetoric in support of this position, the record does not support the rhetoric. As the district court found, during the 200708 election cycle, the national parties raised more money than they raised in the election cycles before the effective date of the BCRA when the parties were also able to raise "soft" money, i.e. money that was not subject to the limitation or prohibitions of FECA. *See Cao* (*District Court*), 688 F.Supp.2d at 517.[12] Because Plaintiffs evidence failed to support their argument, the district court did not abuse its discretion in concluding that

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[12] The district court's factual findings further support the district court's conclusion that the $5,000 limitation does not preclude parties from fulfilling their roles in funding the campaigns of federal candidates. As the district court noted, "[i]n the 2008 election cycle, parties supported their federal candidates with a total of $529,262 in contributions, $31,256,379 in coordinated expenditures, and $54,563,499 in independent expenditures." *Cao* (*District Court*), 688 F.Supp.2d at 549.

subsection (c) of the Plaintiffs' eighth question is frivolous.

B. Certified Questions

[**14] Having found the district court did not abuse its discretion in finding the above [*421] questions frivolous, we now turn to the questions certified to the en banc court.

1.

The district court certified the first constitutional question as follows:

> Has each of the plaintiffs alleged sufficient injury to constitutional rights enumerated in the following questions to create a constitutional "case or controversy" within the judicial power of Article III?

Cao (*District Court*), 688 F.Supp.2d at 504.

As the Supreme Court observed, "[a] party seeking to invoke § 437h must have standing to raise the constitutional claim." *California Med. Ass'n,* 453 U.S. at 193 n. 14, 101 S.Ct. 2712. This requires us to decide "whether appellants have the 'personal stake in the outcome of the controversy' necessary to meet the requirements of Art. III." *Buckley,* 424 U.S. at 11, 96 S.Ct. 612 (quoting *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). "Standing requires, at a minimum, three elements: injury in fact, a 'fairly traceable' causal link between that injury and the defendant's conduct, and the likelihood that the injury will be 'redressed by a favorable decision.' " *Cadle Co. v. Neubauer,* 562 F.3d 369, 371 (5th Cir.2009) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

In the present case, the Plaintiffs have met their

Article III burden. First, the complaint alleges an injury that is concrete, not hypothetical. The complaint establishes that the RNC spent all of its $42,100 in expenditures on Cao's election campaign allotted under the Party Expenditure Provision and reached its $5,000 contribution limit. Furthermore, the complaint alleges that during the course of Cao's campaign, the RNC wanted to make additional expenditures, and but for the $42,100 Party Expenditure Provision making it illegal to do so, [**15] the RNC would have made these expenditures. This injury is not conjectural, but rather, is sufficiently concrete to satisfy the requirements of Article III.

Moreover, the Plaintiffs' alleged injury is fairly traceable to the FEC's conduct, as it is the FEC's implementation of the Act and its regulations that render the Plaintiffs' desired speech illegal. The Plaintiffs also satisfy *Lujan*'s third requirement, redressability, since a favorable ruling by this en banc court would permit the Plaintiffs to make further monetary contributions and carry out their desired coordinated speech acts-without any fear that the Government would regulate their coordinated expenditures pursuant to FECA.

Therefore, Plaintiffs have demonstrated sufficient Article III standing to bring their constitutional claims.

2.

The district court certified the third question as follows:

> Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) violate the First Amendment rights of one or more plaintiffs as applied to a political party's in-kind and direct contributions

> because it imposes the same limits on parties as on political action committees?

Cao (*District Court*), 688 F.Supp.2d at 504.

In the third certified question, the Plaintiffs claim that § 441a(a)(2)(A)'s limitation violates the First Amendment because it imposes the same contribution limitations on parties as it does on political action committees ("PACs"). The Plaintiffs raise three arguments in support of this proposition: first, that the Supreme Court's decisions in *Buckley* and *Colorado I* support the notion that political parties' political [*422] speech deserves a higher degree of protection than the political speech of PACs; second, that the $5,000 contribution limitation violates *Randall*; and third, that the Supreme Court's decision in *Citizens United v. FEC*, ---U.S. ----, 130 S.Ct. 876, 899, --- L.Ed.2d ---- (2010), should alter the analysis of [**16] contribution limits FECA places on political parties and PACs. These arguments are without merit.

First, the Plaintiffs misconstrue the principal holdings in *Buckley* and *Colorado I*. Although the Court in both *Buckley* and *Colorado I* acknowledged the important historic role that political parties have played in the democratic election of this Nation's public officials, the Court simultaneously acknowledged that it is this precise role that political parties fill that gives rise to the Government's compelling interest in regulating their coordinated expenditures and contributions. Notably, the *Colorado II* Court effectively rejected the argument Plaintiffs now make, reasoning that:

> The Party's arguments for being treated differently from other political actors subject to limitation on political spending under the Act do

> not pan out . . . . In reality, parties . . . function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape. Indeed, parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players.

Colorado II, 533 U.S. at 455, 121 S.Ct. 2351. Thus, to the extent that the Plaintiffs attempt to argue that *Buckley* and *Colorado I* support the proposition that the Government cannot place the same restrictive contribution limitations on political parties that it places on PACs, that argument is foreclosed by *Colorado II*–where the Supreme Court's analysis fully supports the Government's differential treatment of political parties-because of what *Colorado II* recognized as a political party's unique susceptibility to corruption.

Second, the Plaintiffs misread *Randall* when they argue that the Court's decision turned on the fact that PACs and political parties were treated equally. In *Randall*, the Court struck down the State of Vermont's Act 64 requiring "that political parties abide by exactly the same low contribution limits that apply to [**17] other contributors," 548 U.S. at 256, 126 S.Ct. 2479, because the contribution limitations were "suspiciously low" and would seriously impair political parties' ability to effectively participate in the political process. *Id.* at 257, 261, 126 S.Ct. 2479. In the present case, FECA does not impose a "suspiciously low" limitation on a political party's contribution, but rather, affords

a more reasonable limitation of $5,000.[13] Consequently, the Supreme Court's invalidation of Act 64 in *Randall* is entirely inapposite to the present constitutional challenge, and therefore does not support Plaintiffs' challenge to § 441a(a)(2)(A).

Third, we do not read *Citizens United* as changing how this court should evaluate contribution limits on political parties and PACs. In *Citizens United,* the Court held that corporations and labor unions had the [*423] right under the First Amendment to make *independent* campaign expenditures. 130 S.Ct. at 913. This conclusion that independent expenditures may not be restricted has been the rule for political parties since *Colorado I. See Colorado II,* 533 U.S. at 455, 121 S.Ct. 2351 ("[U]nder *Colorado I,* [a political party has had the ability] to spend money in support of a candidate without legal limit so long as it spends independently. A party may spend independently every cent it can raise wherever it thinks its candidate will shine, on every subject and any viewpoint.").[14] Thus, the Supreme Court's decision in *Citizens United*—regarding a corporation's right to make independent expenditures—provides no reason to change our analysis of

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[13] The *Randall* Court provided two additional reasons for finding Act 64 unconstitutional: first, the state statute provided no generous additional limit for coordinated party expenditures, and second, each limit applied to all national, state, and local affiliates of a party combined, as well as both the primary and general elections combined. *See id.* at 257, 249, 259, 126 S.Ct. 2479. These factors are noticeably absent from the Plaintiffs' present challenge.

[14] Notably, in the 2008 election cycle, political parties made $280,873,688 in independent expenditures. *Cao* (*District Court*), 688 F.Supp.2d at 518.

the validity of the contribution limits FECA places on political parties and PACs.

For the above reasons, we find that § 441a(a)(2)(A)'s $5,000 contribution [**18] limitation is constitutional. The fact that the Government's "closely drawn" contribution limitation applies equally to both political parties and PACs is of no constitutional moment.

3.

The district court certified the fourth question as follows:

> Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) facially violate the First Amendment rights of one or more plaintiffs because it is not adjusted for inflation?

Cao (*District Court*), 688 F.Supp.2d at 504.

In fashioning their argument that the $5,000 contribution limit is unconstitutional because it is not adjusted for inflation, the Plaintiffs rely heavily on the Supreme Court's decision in *Randall v. Sorrell.* While the failure to index for inflation was one reason the Court struck down Vermont's contribution limitation, the *Randall* Court reasoned that "[a] failure to index limits means that limits which are already suspiciously low . . . will almost inevitably become too low over time." 548 U.S. at 261, 126 S.Ct. 2479. The Court's statement does not, in turn, mean that all contribution limits not indexed for inflation are automatically "suspiciously low" and unconstitutional. In the present case, FECA's $5,000 limitation in § 441a(a)(2)(A) is not comparable to Vermont's $200–$400 limitation. Consequently, we are not presented with circumstances in which the failure to index for inflation is coupled with a contribution limitation so

"suspiciously low" that it warrants this court's judicial supervision to prevent the limitation from becoming "too low over time."

Furthermore, the Plaintiffs' argument that this court should invalidate § 441a(a)(2)(A) based on its failure to index for inflation alone overlooks the Supreme Court's decision in *Buckley,* where the Court recognized that "Congress' failure to engage in such fine tuning does not invalidate the legislation." [**19] *Buckley,* 424 U.S. at 30, 96 S.Ct. 612.[15] So long as the Government can establish "that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* (quotations and citations omitted). As this Court does not possess the "particular expertise" attributable to legislators who are "better equipped to make such empirical judgments," we decline the opportunity to "determine with any degree of exactitude [*424] the precise restriction necessary to carry out the statute's legitimate objectives." *Randall,* 548 U.S. at 248, 126 S.Ct. 2479.

Accordingly, we find § 441a(a)(2)(A)'s $5,000 contribution limitation survives the Plaintiffs' constitutional challenge presented in the fourth certified question.

III.

The only remaining question requires a more detailed discussion. The second question certified to the en banc court asks:

Do the expenditure and contribution limits and

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[15] It is worth noting that no court has ever invalidated a contribution limitation based solely on its failure to index for inflation.

> contribution provision in 2 U.S.C. §§ 441a(a)(23), 441a(a)(2)(A), and 441a(a)(7)(B)(i) violate the First Amendment rights of one or more of [the] plaintiffs as applied to coordinated communications that convey the basis for the expressed support?

Cao (*District Court*), 688 F.Supp.2d at 504.

This question arose out of the RNC's desire to spend in excess of the amount allowed for coordinated campaign expenditures under the Party Expenditure Provision. Particularly, the RNC wanted to expend its funds to run a radio advertisement in support of Cao (hereinafter "the Cao ad"). The proposed Cao ad said:

> Why We Support Cao
>
> [**20] The Republican National Committee has long stood for certain core principles, which we believe are the fundamentals of good government. When it comes to the issues of lower taxes, individual freedoms and a strong national defense, we need leaders who will stand with the American people and defend those issues.
>
> We need leaders who understand that our economy is in a recession, our individual freedoms are constantly under attack and we continue to fight the global war on terrorism to keep our families safe.
>
> Joseph Cao understands and fights for those issues. And, that is why we ask you to join us in supporting him on December 6. It's important for Louisiana and important for the country.

Id. at 532. The RNC wanted to coordinate with the Cao campaign as to the "best timing" for the Cao ad. *See* Joint Stipulation of Fact ¶ 32. However, as the RNC

readily admitted at oral argument before the en banc court and its 28(j) letter to the court, the RNC's involvement with the Cao campaign amounted to coordination,[16] and the RNC already had spent the entire amount it was allowed [**21] to spend on coordinated campaign expenditures under FECA. Therefore, the RNC concluded that it could not coordinate with the Cao campaign to run the Cao ad without violating [*425] FECA. Ultimately, the RNC chose to not expend its funds to air the Cao ad and brought this challenge to FECA's restrictions on coordinated expenditures.

Because we are a court of error and only decide

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[16] The following exchange took place at oral argument:

> Judge Davis: When the party allowed the candidate to, consult the candidate on timing, and apparently that's all we know and that's all that's knowable because nothing took place, why is that not coordinated . . .
>
> Plaintiffs' Counsel: It is.
>
> Judge Davis: . . . under the regulations it probably would be . . .
>
> Plaintiffs' Counsel: It is.
>
> Judge Davis: . . . why is it not?
>
> Plaintiffs' Counsel: It is. Absolutely. To consult with the timing it means that it is coordinated. Now, they would rather talk about, you know, what happens if the candidate, you know, wrote the ad and gave it to the party. Well there's no like degree of being pregnant. It's either coordinated or not coordinated . . ..

Plaintiffs' counsel further stated in response to a question from Judge Owen that ". . . [O]ur argument is if it is our speech it doesn't make it independent. We acknowledge that the Cao ad, and they [the FEC] acknowledge that the Cao ad, is coordinated."

issues the parties bring to us, it is important at the outset to identify the RNC's sole argument on this certified question. *See Sherman v. United States,* 356 U.S. 369, 376, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) ("We do not ordinarily decide issues not presented by the parties . . .."). The RNC argues and *only* argues that §§ 441a(d)(2)(3), 441a(a)(2)(A), and 441a(a)(7)(B)(i) violate its First Amendment rights because the provisions regulate the RNCs "own speech." The RNC asserts that its own speech may not be regulated, regardless of whether the speech is coordinated.[17] "Own speech" is defined by the RNC as speech that is "attributable" to the RNC and includes speech the candidate writes and decides how the speech is to be disseminated. In other words, the RNC argues that speech it adopts is attributed to it and therefore exempt from regulation regardless of the extent of coordination with the candidate.

With respect to this certified issue, the broad "own speech" argument is the only argument the RNC raised in its complaint,[18] the only argument the district court addressed,[19] the only argument the RNC raised in its briefs to the [**22] en banc court,[20] and the only argu-

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[17] Presumably this argument would apply to any person's or entity's "own speech."

[18] *See* Second Amended Complaint, 43-44, 83-85.

[19] *See Cao* (*District Court*), 688 F.Supp.2d at 539-42.

[20] *See* Plaintiffs-Appellants Brief at 11-25. The Plaintiffs' state in their brief that "[in this certified question], Plaintiffs-Appellants challenged whether a party's 'own speech' may be deemed a contribution." *Id.* at 11. "A political party's 'own speech' is speech that is *attributable* to it, even if input on the speech as to details such as content, media,

ment the RNC's counsel was willing to make at oral argument before the en banc court. In response to friendly questions from the en banc bench, the RNC's counsel declined the opportunity to argue that the level of involvement between the RNC and the candidate with respect to the Cao ad did not amount to coordination. More broadly stated, counsel for the RNC refused to adopt the position that the level of coordination should affect whether an expenditure may be regulated. Instead, counsel steadfastly insisted that the proposed expenditure was coordinated and that his sole argument was that Congress could not regulate the RNC's "own speech." For example, the following exchange occurred at oral argument:

> Judge Jolly: . . . [Y]our own argument is that as long as it is your speech, there are no further concerns about it. Is that . . .
>
> Plaintiffs' Counsel: That is correct.
>
> Judge Jolly: But, on the other hand, you have admitted also that if you run it and it becomes, you run it so often and so much and with such degree of coordination that it becomes their speech.
>
> Plaintiffs' Counsel: No, the degree of coordina-

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and timing was received from others, such as a party's media consultants, script writers, pollsters, officials, constituency, ideological allies, and candidates." *Id.* at 16 (footnote omitted). "Attribution belongs to the entity that pays for and adopts the speech." *Id.* "*Cao Ad* is clearly RNC's own speech because it would be attributable to RNC and bear a disclaimer showing that RNC paid for the ad." *Id.* at 17. This "own speech" argument is the sole argument Plaintiffs make to the en banc court on this issue.

> tion does not affect whose speech it is at all.
>
> [**23][*426] Judge Jolly: In other words, you can sit down and discuss with them the degree of coordination on fifty ads, and you can keep running that ad and running that ad on their time, and it, and you are running a number of ads, and it still is your speech notwithstanding the "Nth" degree of coordination that you have in running them?
>
> Plaintiffs' Counsel: That's right. There is no degree of being pregnant. You're either or not.

Thus the record unambiguously reflects that the RNC's sole challenge in this case with regard to the Cao ad is whether Congress may regulate a party's own speech, meaning speech that is paid for by the party and adopted by the party regardless of coordination with the candidate. We therefore examine only that argument.

To evaluate the merit of the Plaintiffs' expansive "own speech" argument, we return to *Buckley v. Valeo,* the first case to discuss coordinated expenditures under FECA. In *Buckley,* the Supreme Court examined, *inter alia,* then-18 U.S.C. § 608(e)(1) which limited individuals' ability to make independent expenditures.[21] 424 U.S. at 39-51, 96 S.Ct. 612. The Government argued that Congress could restrict independent expenditures because independent expenditures could be used to circumvent contribution limits. The *Buckley* Court rejected the Government's argu-

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[21] By its terms, § 608(e)(1) did not apply to national political parties. Since *Buckley*, § 608(e)(1) has been repealed and replaced with similar provisions in 2 U.S.C. § 441a.

ment. In finding that independent expenditures could not be regulated, the Court compared § 608(e)(1) with § 608(b), the provision that regulated expenditures coordinated with a candidate. The *Buckley* Court stated:

> . . . [C]ontrolled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section [**24] 608(b)'s contribution ceilings rather than § 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, § 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Id. at 46-47, 96 S.Ct. 612 (footnote omitted). Thus, the *Buckley* Court concluded that although Congress was unable to regulate individuals' independent expenditures, Congress could regulate individuals' coordinated expenditures.

Building on and embracing its analysis in *Buckley,* the Court in *Colorado I* and *Colorado II* further examined the limitations on coordinated and independent

expenditures as applied to political parties. In *Colorado I,* the Colorado Republican Party ("CRP") brought an as-applied challenge to the Party Expenditure Provision arguing that restricting a party's independent expenditures was unconstitutional. The *Colorado I* Court followed the *Buckley* rationale and found that "the constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure." *Colorado* [*427] *I,* 518 U.S. at 617, 116 S.Ct. 2309. In holding that the restraint on an independent expenditure was unconstitutional, the Court distinguished between coordinated expenditures and independent expenditures, stating:

> . . . [T]he Court's cases have found a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." . . . [R]easonable contribution limits directly and materially advance the [**25] Government's interest in preventing exchanges of large financial contributions for political favors.
>
> . . . [L]imitations on independent expenditures are less directly related to preventing corruption, since "the absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."

Id. at 614-16, 116 S.Ct. 2309 (citations omitted). Thus, the *Colorado I* Court found that the Party Expenditure Provision was unconstitutional as applied to the CRP's

independent expenditures.

In *Colorado I,* the CRP also raised a facial challenge to the application of the Party Expenditure Provision to coordinated expenditures. *Id.* at 623, 116 S.Ct. 2309. The *Colorado I* Court remanded this facial challenge because the lower courts had not considered the issue. *Id.* at 625, 116 S.Ct. 2309. The remanded issue of whether Congress could restrict coordinated expenditures reached the Supreme Court five years later as *Colorado II.* After analyzing its precedents in *Buckley* and *Colorado I,* the *Colorado II* Court found that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." 533 U.S. at 465, 121 S.Ct. 2351. In examining whether coordinated expenditures could be restricted, the Court applied the intermediate scrutiny standard announced in *Buckley:* the restriction must be closely drawn to match a important government interest. *Id.* at 456, 121 S.Ct. 2351. The Court found that Congress could regulate coordinated expenditures as contributions because of the sufficiently important governmental interest in preventing the potential for political corruption by circumvention of campaign finance laws. *Id.* at 459-60, 121 S.Ct. 2351. The Court stated:

> There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of [**26] unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. Coordinated expenditures of money donated to a party are tailor-made to undermine contribution

> limits. Therefore the choice here is not, as in *Buckley* and *Colorado I*, between a limit on pure contributions and pure expenditures. The choice is between limiting contributions and limiting expenditures whose special value as expenditures is also the source of their power to corrupt. Congress is entitled to its choice.

Id. at 464-65, 121 S.Ct. 2351 (footnotes omitted).

Though the *Colorado II* Court unambiguously found the application of the Party Expenditure Provision to coordinated expenditures to be facially constitutional, the Plaintiffs argue that "*Colorado II* expressly left open the as-applied question of whether parties' own speech may be limited [*428] as contributions." Plaintiffs-Appellants' Brief at 12 (footnote omitted). This argument is based on a footnote in the majority opinion of *Colorado II* that states:

> Whether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on application of the limit to specific expenditures is a question that, as JUSTICE THOMAS notes, we need not reach in this facial challenge.
>
> The Party appears to argue that even if the Party Expenditure Provision is justified with regard to coordinated expenditures that amount to no more than payment of the candidate's bills, the limitation is facially invalid because of its potential application to expenditures that involve more of the party's own speech. But the Party does not tell us what proportion of the spending falls in one category or the other, or otherwise lay the groundwork for its facial overbreadth claim.

533 U.S. at 456 n. 17, 121 S.Ct. 2351 (citations omitted). The Plaintiffs further rely on Justice Thomas' dissent, in which he states:

> To the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such [**27] expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures remains unresolved. At oral argument, the Government appeared to suggest that the Party Expenditure Provision might not reach expenditures that are not functionally identical to contributions.

Id. at 469 n. 2, 121 S.Ct. 2351 (Thomas, J., dissenting).

Assuming that the *Colorado II* Court left open the possibility for an as-applied challenge to the Party Expenditure Provision's application to coordinated spending, the facts and arguments in the instant case do not present this court with that question. Acceptance of the Plaintiffs' "own speech" argument would effectively eviscerate the Supreme Court's holding in *Colorado II,* which dealt only with coordinated expenditures. The Court in *Colorado II* expressly recognized that Congress has the power to regulate coordinated expenditures in order to combat circumvention of the contribution limits and political corruption. *Id.* at 456, 121 S.Ct. 2351 (majority opinion) ("We accordingly apply to a party's coordinated spending limitation the same scrutiny we have applied to the other political actors, that is, scrutiny appropriate for a contribution limit, enquiring whether the restriction is 'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combat-

ing political corruption."). The *Colorado II* Court stated:

> . . . [T]he question is whether experience under the present law confirms a serious threat of abuse from the unlimited coordinated party spending as the Government contends. It clearly does. Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open.

Id. at 457, 121 S.Ct. 2351 (citation and footnote omitted).

[**28] If this court were to accept the Plaintiffs' exceedingly broad argument, we would be reaching a conclusion inconsistent with the *Colorado II* Court's teaching that coordinated expenditures may be restricted. The RNC's sole argument [*429] throughout has been that there is no limit to its claim that Congress cannot regulate a party's own speech regardless of the degree of coordination with the candidate. The district court succinctly identified the Plaintiffs' argument: "Plaintiffs claim that a party coordinated communication disclosed as paid for by the party is the party's 'own speech' even if a candidate indicates in the communication that he has approved the message." *Cao (District Court)*, 688 F.Supp.2d at 531. Moreover, "Plaintiffs claim that a party coordinated communication disclosed as having been paid for by the party is the party's 'own speech' even if the candidate or her campaign actually creates the communication and

passes it along to the party." *Id.* at 530. Thus, under the Plaintiffs' standard, all coordinated expenditures paid for and adopted by the party would be considered a party's own speech and not subject to restriction.[22] As demonstrated above, the *Colorado II* Court, as well as the Court's earlier cases, clearly held that coordinated expenditures may be restricted to prevent circumvention and corruption.

We find the *Colorado II* Court's concern with corruption particularly important since, in the present case, the Plaintiffs admit that they themselves have already taken steps to circumvent the Act's individual donor contribution limits. The district court found that "[t]he RNC encourages its candidates to tell their 'maxed out' donors to contribute to the RNC." *Cao* (*District Court*), 688 F.Supp.2d at 526. Representative Cao confirmed in his deposition this behavior [**29] by the RNC. "Congressman Cao has personally suggested to donors who had given the maximum amount to his campaign that they could also contribute to the party." *Id.* Furthermore, the district court found that "the party has shared [its] donor list" with its federal candidates, and that "[t]he sharing of information also happens in the other direction[, since the party] receives information from federal candidates about who has contributed to their campaigns." *Id.* at 523.

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[22] The district court stated that "[t]he only type of party-coordinated communication that plaintiffs believe is not a party's 'own speech' and therefore may be constitutionally limited is one that a campaign airs and for which the party merely pays the bill." *Cao*, 688 F.Supp.2d at 531. However, under Plaintiffs' argument even this type of communication would be considered the party's own speech if the party adopted the ad as its own.

The district court also found that "the RNC organizes 'fulfillment' events to which individuals who have made a large contribution to the RNC of a specified amount are invited" so that they can have special access to federal lawmakers.[23] *Id.* The *Colorado II* Court warned that "[i]f the effectiveness of party spending could be enhanced by limitless coordination, the ties of straitened candidates to prosperous ones and, vicariously, to large donors would be reinforced as well." *Colorado II,* 533 U.S. at 460 n. 23, 121 S.Ct. 2351. The above facts demonstrate the potential corruption and abuse that concerned *Colorado II. Id.* at 456, 121 S.Ct. 2351. At oral argument, the en banc court gave counsel every opportunity to address the concern that the Plaintiffs' argument conflicts with the Supreme Court's controlling [*430] precedent.[24] [**30]

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[23] The district court found the following:

> The RNC has created tiers of donors with specified benefits based on levels of annual giving: For example, donors who give $15,000 receive intimate luncheons, dinners, and meetings with key policymakers; donors who give $30,400 enjoy exclusive private functions with elected Republican leaders; and donors who commit to raising $60,800 receive at least one . . . exclusive event during the year, as well as other intimate events with key GOP policymakers.

Cao (District Court), 688 F.Supp.2d at 523 (internal quotation marks omitted).

[24] Chief Judge Jones questioned RNC's counsel in this regard:

> [T]he Court has always very often said "well, coordinated expenditures are different." Now they haven't delineated the line between speech and coordination, but it seems to me you are trying to pretty much

In response, Plaintiffs' counsel reiterated that the challenge was an as-applied challenge, whereas *Colorado II* was a facial challenge. *Colorado II*, the Plaintiffs assert, left open the possibility of their as-applied challenge.

Colorado II certainly left open the possibility for an as-applied challenge to the Party Expenditure Provision as it applies to coordinated expenditures; it is well-established that the facial upholding of a law does not prevent future as-applied challenges. *E.g., Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12, 126 S.Ct. 1016, 163 L.Ed.2d 990 (2006) (holding that the plaintiff could bring an as-applied challenge to BCRA despite the Court upholding the statute on its face). However, simply characterizing the challenge as an as-applied challenge does make it one. "While rejection of a facial challenge to a statute does not preclude all as-applied attacks, surely it precludes one resting upon the same asserted principle of law." *Penry v. Lynaugh*, 492 U.S. 302, 354, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (Scalia, J., dissenting). *See also RNC v. FEC*, 698 F.Supp.2d 150, 157 (D.D.C.2010) ("In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent."), *summ. aff'd, RNC v. FEC*, --- U.S. ----, 130 S.Ct. 3544, --- L.Ed.2d ---- (2010).

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shatter that barrier. And the second thing is, *Colorado I* would have been decided in the way that you advocate if the Court had accepted your position. So what has changed since *Colorado I*?

The argument raised by the Plaintiffs in this case rests not on a sufficiently developed factual record, but rather, on the same general principles rejected by the Court in *Colorado II*, namely the broad position that coordinated expenditures may not be regulated.[25] Finding for the Plaintiffs would require us to hold that Congress cannot limit a party's expenditures on a campaign ad, the content of which the party adopts, regardless of the degree of coordination with [**31] the candidate.[26] Because such a conclusion would effectually overrule all restrictions on coordinated expenditures, the RNC's argument must fail in light of *Colorado II*.

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[25] The Plaintiffs' Second Amended Complaint raises further concern that this is merely an attempt to overturn *Colorado II* because the Plaintiffs chiefly rely on the rationale of the *Colorado II* dissenting opinion. *See* Second Amended Complaint, 43-44, 83-85.

[26] Chief Judge Jones posits that we conclude the Cao Ad is a "coordinated" expenditure simply because the government claims it is. She writes: "This court is not bound by the government's simply labeling the speech 'coordinated' . . . . 'An agency's simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one.' " Jones Dissent at 443 (quoting *Colorado I*, 518 U.S. at 621-22, 116 S.Ct. 2309). True enough. We note, however, that we are not relying on the government's claim that the Cao Ad is coordinated, but rather, we place our reliance on the Plaintiffs' admissions as to the extent of the coordination and Plaintiffs' labeling of their own claim. Notably, in their Rule 28(j) letter to the court, the Plaintiffs once again confirmed that the proposed Cao Ad amounted to coordination: "RNC provides a specific ad, a specific coordinating candidate, and specific detail as to coordination nature (timing, with content awareness)."

The Plaintiffs further argue that the Court's recent decision in *Citizens United* [*431] has signaled a change in the law in this area. Undoubtedly, *Citizens United* altered the legal landscape with respect to corporations and labor unions, because the Supreme Court held that these entities may make independent campaign expenditures free of Congressional limitations. *See* 130 S.Ct. at 913. However, as we discussed earlier, the Supreme Court's decision in *Citizens United* has no bearing on whether Congress has the power to restrict political parties' *coordinated* expenditures. *Citizens United* addresses only independent expenditures and simply does not address coordinated expenditures. Regardless, the holding of *Citizens United*–that the restrictions on independent expenditures by corporations and labor unions violated the First Amendment–is entirely consistent with the Court's decision in *Colorado I*, in which the Court held that Congress could not regulate the independent expenditures of a party. *See Colorado I*, 518 U.S. at 617, 116 S.Ct. 2309. Thus, as we have previously stated, there is no reason for us to conclude that *Citizens United* undermines *Colorado II*'s holding that Congress can regulate a party's coordinated expenditures.[27]

[**32] The Plaintiffs have offered much rhetoric regarding the Party Expenditure Provision's "suppression" of their speech, yet as the district court noted in its factual findings, "party committees like the RNC rarely reach their legal limit for coordinated expenditures in

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[27] *See also RNC v. FEC*, 698 F.Supp.2d at 153 (noting that *Citizens United* did not disturb prior decisions that found limits on contributions to political parties to be constitutional).

a particular House or Senate race." *Cao* (*District Court*), 688 F.Supp.2d at 520.[28] Overall, "[i]n the 2008 election cycle, the major national party committees (RNC and DNC) supported their federal candidates with a total of $529,262 in contributions, $31,256,379 in coordinated expenditures, and $54,563,499 in independent expenditures." *Id.* at 517. Thus, the Party Expenditure Provision hardly amounts to a ban on free speech. Instead, the Act's cap on coordinated expenditures seems a small price to pay to preserve "the integrity of our system of representative democracy." *Buckley,* 424 U.S. at 26, 96 S.Ct. 612.

The Plaintiffs' "own speech" argument cannot be reconciled with *Colorado II.* As such, we find that the expenditure and contribution limits and contribution provision in 2 U.S.C. §§ 441a(a)(2)(3), 441a(a)(2)(A), and 441a(a)(7)(B)(I) do not violate the First Amendment rights of one or more of the Plaintiffs as applied to coordinated communications that convey the basis for the party's expressed support.

IV.

The principal disagreement we have with the dissents is over the scope of Plaintiffs' argument with respect to the constitutionality of contribution restrictions relative to coordinated expenditures. Based on the record, briefs and oral argument, we have explained above why we conclude that the only issue Plaintiffs presented to us for decision is whether the

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[28] "Although there are at least 468 federal elections each cycle, Republican committees reached the maximum amount of coordinated expenditures in only seven congressional races in 2008, and in two races in 2006." *Cao* (*District Court*), 688 F.Supp.2d at 520.

RNC's "own speech" is [**33] subject to regulation and restriction under FECA. As we read Chief Judge Jones's dissent, she agrees that *Colorado II* answers this question and authorizes regulation of RNC's own speech generally. Chief Judge Jones's principal argument is that Plaintiffs also presented for decision whether [*432] the Act can constitutionally restrict expenditures for the Cao Ad involved in this case when that ad was coordinated between the RNC and the candidate as to "timing only."

Contrary to the position outlined above, Chief Judge Jones's dissent asserts first that the Plaintiffs raised this latter "narrow" issue in its brief. To support this assertion, Chief Judge Jones relies on two sources in Plaintiffs' briefs. First, she relies on recitations of Joint Stipulation of Fact ¶ 32, which states that "RNC intends to coordinate the *RNC Cao Ad* with Joseph Cao as to the best timing for the *Ad,* but otherwise the *Ad* would not be coordinated with Cao." The recitation of a stipulation of fact does not present an issue on appeal. The only other passage in the Plaintiffs' briefs that the Chief Judge relies on to support her view that Plaintiffs wish to present this as an issue on appeal is in a footnote in the Plaintiffs' reply brief. The law is clear in this circuit that we do not consider arguments made for the first time in an appellant's reply brief. *Woods v. Johnson,* 75 F.3d 1017, 1035 n. 24 (5th Cir.1996) ("[W]e do not consider issues raised for the first time in a reply brief."); *Cavallini v. State Farm Mt. Auto Ins. Co.,* 44 F.3d 256, 260 n. 9 (5th Cir.1995); *see also Cinel v. Connick,* 15 F.3d 1338, 1345 (5th Cir.1994) ("A party who inadequately briefs an issue is considered to have abandoned the claim.") (citing *Villanueva v. CNA Ins. Cos.,* 868 F.2d 684, 687 n. 5

(5th Cir.1989)). Moreover, we read this footnote as an attempt by Plaintiffs to explain the legal question *Colorado II* left open, particularly Justice Thomas' view of the open question which he articulated in his dissent. This passage notes that *Colorado II* left open "whether some other speech communications may not be regulated because coordination is de minimis [**34] (e.g., just timing) . . . ." *See* Jones Dissent at 438 (citing footnote 5 in Plaintiffs-Appellants' Reply Brief). Plaintiffs, however, make no argument that coordination of the Cao Ad (with timing plus knowledge of content) is *de minimis*. Notably, this is the only passage referring to "*de minimis*" coordination in either of Plaintiffs' briefs. That Plaintiffs never intended to make the *de minimis* argument is further supported by the fact (as we will discuss below) that counsel repeatedly disclaimed an intent to raise this narrow issue on appeal.

Even if we accept that the argument in Plaintiffs' reply brief properly raised this issue for our consideration, it is clear to us that counsel for Plaintiffs at oral argument abandoned this issue. We have quoted at length above counsel's persistent disclaimers that he is relying on the fact that the coordination between the candidate and the party was *de minimis*. He consistently argues that once the speech is determined to be the party's "own speech," then regulation or restrictions on that speech is unconstitutional. All of the responses given by counsel to questions from the court disclaiming that he is making this narrow argument cannot be explained as agreeing that the Cao Ad may amount to coordination under the regulation but failing to concede that the Cao Ad amounts to coordination for purposes of our constitutional analysis of

Plaintiffs' claim. *See* Jones Dissent at 438 n. 5.

Even if we further consider that Plaintiffs made and did not abandon the argument that the coordination between the candidate and the party was *de minimis,* based on the stipulation and admission of counsel the coordination cannot be considered *de minimis.* At oral argument, Plaintiffs' counsel conceded that the RNC intended to coordinate the Cao Ad with Cao not only with regard to timing, but *also* by providing Cao with advance knowledge [*433] of the Cao Ad's [**35] content.[29] Plaintiffs' counsel expressly repeated this concession in a supplemental Rule 28(j) letter filed with the court after oral argument stating that "RNC provides a specific ad, a specific coordinating candidate, and *specific detail as to coordination nature (timing, with content awareness).*" (emphasis added).[30] These concessions by counsel are consistent with the allegations of the Plaintiffs' Second Amended Complaint, which recites the specific text of the Cao Ad, necessarily indicating that Plaintiffs intended to provide Cao with advance knowledge of the Cao Ad's content. *See* Second Amended Complaint ¶ 44.[31]

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[29] Upon questioning by Judge Owen, counsel stated "I think that is part of the facts, that they knew what the *Cao Ad* said," and again confirmed that content knowledge is "part of the fact pattern."

[30] FEC counsel's own supplemental Rule 28(j) letter to the court correctly observed that the admission by Plaintiffs' counsel at oral argument "clarified for the first time that Cao not only planned to coordinate as to timing, but also would be aware of the content of the advertisement."

[31] The full text of the Cao Ad appearing in the Second Amended Complaint also appears in ¶ 43 of Plaintiffs' First Amended Complaint filed December 4, 2008, two days

This "content awareness" stipulation has significance that the dissents completely overlook. For instance, given advance knowledge of the Cao Ad's content, if Cao approved of the content and found it favorable to his campaign, he may have told or requested the RNC to run the ad frequently during prime hours. If Cao disapproved of the Cao Ad's content and found it unfavorable to his campaign, he may have told or requested the party to run it infrequently during off hours, or perhaps not at all. This degree of coordination of campaign expenditures contrasts sharply with the Supreme Court's functional definition of independent expenditures. Whereas the Supreme Court has explained that an independent expenditure representing the party's own views may at times [**36] work against the candidate's interests,[32] timing-plus-content-awareness coordination may ensure that a party's message virtually always works in the candidate's favor.[33] *See Buckley,* 424 U.S. at 47, 96 S.Ct. 612;

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before the election. Thus, Cao knew of the Cao Ad's content at least two days before the election, and if relief had been immediately granted the coordination would have taken place with his knowledge of the Cao Ad's content.

[32] Cao's experience with the RNC's previous independent expenditures confirms this distinction. He testified that some of the RNC's prior independent expenditures harmed his election chances. Deposition of Anh "Joseph" Cao ("Cao Dep.") at 42 (FEC Exh. 4 to Proposed Findings of Fact).

[33] This is consistent with Cao's understanding of the nature of the intended coordination. At deposition, he testified as to the following:

> I would like to know the contents of those ads . . .. And so if we were allowed to coordinate it with them, I would have loved to have their fundings and

Colorado II, 533 U.S. at 464, 121 S.Ct. 2351. For these reasons we cannot agree with Chief Judge Jones's conclusion that "there is no functional difference between the Cao Ad and a constitutionally protected independent expenditure." Jones Dissent at 445. As we have explained above, knowledge of content plus timing coordination makes a huge difference relative to the benefit of the ad to the candidate that the dissent fails to recognize-namely, the candidate's ability to direct approved content for maximum impact and redirect disapproved [*434] content for minimum impact on his campaign.[34]

This type of coordinated activity, moreover, implicates the same corruption and circumvention concerns of the *Colorado II* Court. As discussed above, the court is particularly concerned with Plaintiffs' admissions that they have already taken steps to circumvent the Act's individual donor contribution limits. [**37] Furthermore, to quote Judge Clement's dissent, if Cao were asked "to provide input on its content" or "asked to provide his consent to run the ad . . . that would indeed raise a suspicion that the parties were attempt-

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> their support and-and to basically coordinate how the ads should be read or—what the ads should say. What our focus—what we want to focus on.

Cao Dep. at 42.

[34] Consideration of the "content awareness" element of Plaintiffs' allegations demonstrates the error in many of the dissents' conclusions, including Chief Judge Jones's assertions that "[t]here is no evidence that he or his campaign . . . provided their views on its content," that "[t]he candidate will not know whether the ad is effective," and that "[c]ontent, however, is not at issue in this case." Jones Dissent at 438, 445, 448.

ing to circumvent the rules against coordination so that the RNC could pay the bill for *Cao's* speech–the evil at which the coordination rules are aimed." Clement Dissent at 452. This is exactly the scenario that is contemplated by the coordination of timing with the addition of advance content awareness, which both dissents refuse to acknowledge. Therefore, based on what we know of the extent of the proposed coordination on this scant record, it is reasonable to infer that the coordination of the Cao Ad between the candidate and the party as to timing with the candidate's prior knowledge of the of the ad's content would amount to a coordinated expenditure subject to restriction under *Colorado II*.

In the absence of additional facts as to the actual extent of the coordination, all the Court is left with is the obligation to give reasonable inferences to the evidence that was produced. And it is the Plaintiffs' burden in an as-applied challenge of this nature to produce the facts upon which he bases his challenge. *Khachaturian,* 980 F.2d at 331. In other words, a plaintiff seeking an injunction in an as-applied challenge generally has the burden to allege enough facts for the Court to decide the constitutional claim while avoiding " 'premature interpretation of statutes'" requiring speculation or conjecture on a " 'factually barebones record.' " *Milavetz, Gallop & Milavetz, P.A. v. United States,* --- U.S. ----, 130 S.Ct. 1324, 1344, 176 L.Ed.2d 79 (2010) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). The Supreme Court "generally disapprove[s] of such challenges." *Id.* "When forced to determine the consti-

tutionality of a statute based solely on such conjecture, we [**38] will uphold the law if there is any 'conceivable' manner in which it can be enforced consistent with the First Amendment." *Id.* at 1345.[35]

In sum, we are satisfied that the *de minimis* coordination issue was not presented to the court for decision. Indeed, we find it strange that the dissents take an argument not made in the district court, nor presented to us on appeal-and wholly disavowed by Plaintiffs' counsel during oral argument-and attempt to [*435] raise it like a Phoenix from the ashes. However, as a court comprised of Article III judges, our role is not to create arguments for adjudication–but rather, our role is to adjudicate those arguments with which we are presented. Thus, we should decline the dissents' invitation to serve as advocates for the Plaintiffs and arbiters of our own engendered claims. Nonetheless, for the sake of completeness, even if the court were to conclude that this issue was presented, it is clear to us that an expenditure for an ad advocating the election of the candidate coordinated as to timing, when the candidate has knowledge of the content of the ad, amounts to a coordinated expenditure that may be constitutionally regulated under *Colorado II*.

We also disagree with the position advocated by Chief Judges Jones and Judge Clement that the *WRTL*

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[35] This is especially true in the context of a pre-enforcement as-applied action. *Id.*; *see also Holder v. Humanitarian Law Project*, ---U.S. ----, 130 S.Ct. 2705, 2722, 177 L.Ed.2d 355 (2010) (Denying a pre-enforcement as-applied First Amendment challenge to the material support provisions of federal anti-terrorism law because plaintiffs did not provide any "specific articulation of the degree to which they seek to coordinate their advocacy.").

analysis applies to this case. In *WRTL*, the Court considered whether the government could regulate an independent expenditure under § 203 of BCRA for payment of an "issue advocacy" ad. 551 U.S. at 455, 127 S.Ct. 2652. No question was raised that the ad was coordinated with the candidate. The Court applied strict scrutiny to the statute and held that BCRA as applied to this ad did not pass constitutional muster. This holding is not inconsistent with *Buckley*, *Colorado I*, and *Colorado II*, all of which make it clear [**39] that strict scrutiny applies to regulation of independent expenditures for political speech.[36]

V.

For the foregoing reasons, we answer the questions certified to the en banc court as follows. First, the Plaintiffs do have standing to bring their claims. Second, § 441a(a)(2)(A)'s $5,000 contribution limit is constitutional even though it imposes the same limits on parties as on PACs and is not adjusted for inflation. Third, §§ 441a(a)(2)(3), 441a(a)(2)(A), and 441a(a)(7)(B)(i) are not unconstitutional as applied to the Plaintiffs. Moreover, we find that the district court did not abuse its discretion in dismissing the frivolous claims. Accordingly, we remand this case to the district court for entry of judgment consistent with this opinion.

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[36] Under *WRTL*, it is clear that the Cao Ad is an express advocacy ad. The Cao Ad affirmatively asks the reader to join the party in supporting Cao on election day. This meets the requirements of an express advocacy ad. *See WRTL*, 551 U.S. at 469, 127 S.Ct. 2652. Additionally, the Plaintiffs' themselves characterize the Cao Ad as "a specific express advocacy communication that RNC intends to make . . . ." Joint Stipulation of Facts ¶ 31.

[**40] E. GRADY JOLLY, Circuit Judge, concurring in result:

I concur in the result reached by the majority because I agree that it reflects the more accurate and realistic way the case has been presented for decision. There is much to admire in Chief Judge Jones's dissent, and if I agreed that the argument she addresses was the question that plaintiffs were actually presenting for decision, I would concur in her opinion. Judge Clement has written clearly but broadly. In my view, she does not merely challenge the statute's express provisions that effectively bar a Party from coordinating its efforts with the campaign of a candidate, but also the Supreme Court's ruling that essentially upholds this provision. Both she and Chief Judge Jones ultimately may be correct. But, in my opinion, not today.

[**41] EDITH H. JONES, Chief Judge, with JERRY E. SMITH, EDITH BROWN CLEMENT, JENNIFER WALKER ELROD and HAYNES, Circuit Judges, concurring in part and dissenting in part:

The first object of the First Amendment is to protect robust political debate that [*436] underpins free citizens' ability to govern ourselves. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . .. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC*, --- U.S. ----, 130 S.Ct. 876, 898, ---L.Ed.2d ---- (2010) (internal citations and quotations omitted). Yet the majority hold that Congress may forbid a political party from broadcasting an advertisement explaining why the party supports its

own congressional candidate merely because the advertisement was coordinated with the candidate as to timing.

We dissent. The Cao Ad cannot be suppressed by the FEC on the facts before us.[1]

The majority's errors are procedural as well as substantive. Taking a most unorthodox approach to First Amendment adjudication, they assert that the "sole" issue before the court is "whether Congress may regulate a party's own speech, meaning speech that is paid for by the party and adopted by the [**42] party regardless of coordination with the candidate." This is not the "sole" issue. The record clearly presents a narrower controversy-timing-only coordination. The majority opinion ignores the stipulated facts and argument presenting the Cao Ad dispute just as it ignores the FEC's concession in oral argument that this dispute touches the outer boundary of the agency's regulatory authority. The usual path of constitutional adjudication is first to consider the fact-based issue and to reach broader constitutional questions only if they are inescapably presented. *Citizens United,* 130 S.Ct. at 918 (Roberts, C.J., concurring). The majority stand this tradition on its head.

Substantively, the majority analysis, flawed by its overbroad premises, ultimately begs the primary

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[1] While this dissent considers the narrow issue whether timing-only coordination of a political party's campaign speech with the candidate it supports may be prohibited by the FECA, Judge Clement's opinion carries the implications of recent Supreme Court decisions further to protect political party "speech that is not the functional equivalent of a campaign contribution." Our approaches are harmonious, reflecting different levels of generality.

question before us-at what point does "coordination" between a candidate and a political party transform the party's communicative speech into a mere "contribution" subject to strict dollar limits? This question was left open by the Supreme Court. *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456, n. 17, 121 S.Ct. 2351, 2366 n. 17, 150 L.Ed.2d 461 (2001) ("*Colorado II*"). In light of subsequent Supreme Court decisions, courts must begin to deal with it.[2]

[**43] Because the majority fail to join issue with the stipulated facts, their opinion cannot defend against the party's as-applied challenge to 2 U.S.C. §§ 441a(d)(2), (3), and (a)(2)(A). But for the issue of "coordination" with the candidate as to its broadcast, the Cao Ad would be speech by the RNC fully protected by the First Amendment. *Cf. FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 467, 127 S.Ct. 2652, 2665 n. 4, 168 L.Ed.2d 329 (2007) [*437] ("*WRTL*"); *Citizens United,* 130 S.Ct. at 908-10. In this as-applied challenge, the government had the burden to show that this expressive but minimally coordinated speech may be subjected to the strict limits reserved for monetary

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[2] The majority "reads" this dissent as agreeing that *Colorado II* "authorizes regulation of RNC's own speech generally." Not so. We read *Colorado II* to acknowledge that expenditures coordinated between a party and a federal candidate range along a spectrum of expressiveness-less-"expressive" party donations like copying equipment clearly fall within the coordinated expenditure limits. More expressive forms of support by the party, however, enjoy stronger constitutional protection. The FEC itself admitted that the Cao Ad lies along the expressive side of the spectrum

contributions. *WRTL*, 551 U.S. at 467, 127 S.Ct. at 2665 n. 4. I conclude, after performing the necessary analysis, that the government may not infringe the party's right to speak in this manner.

The foregoing propositions are elaborated in three steps. First, I will restate the obvious, that a narrower, fact-based challenge was presented to the court. Second, according to well settled precedent, the narrower issue ought to be decided. Third, I address the as-applied challenge on its merits, placing the burden on the government.[3]

I. A Narrow Fact-Based Challenge Is Before The Court

[**44] The majority state that "the record unambiguously reflects that the RNC's sole challenge in this case with regards to the Cao Ad is whether Congress may regulate a party's own speech, meaning speech that is paid for by the party and adopted by the party regardless of coordination with the candidate." Indeed, the majority devote nearly as much discussion to justifying their "sole challenge" approach as they do to rejecting the challenge. Despite the majority's contentions, the court is obliged to address the facts that have actually been presented-specifically, whether this particular ad can be regulated as a *de facto* contribution even though the coordination regarded solely the timing of its broadcast.[4]

[3] I concur in the rest of the majority opinion because the other issues are controlled by Supreme Court authority. This dissent concerns the majority's disposition of certified questions 3 and 6.

[4] Responding to these facts, the majority contends that (a) Cao's counsel really disclaimed the narrower approach taken by this dissent and (b) counsel conceded not only timing but "content awareness" underlay the proposed

It is important to stress just how minimal was the level of coordination. When the Supreme Court has interpreted the term "coordinated expenditures," it described a spectrum, at one end of which political parties would simply foot the candidate's bills. *Colorado II,* 533 U.S. at 439, 460, 121 S.Ct. at 2357, 2368. The present scenario stands at the other end. The Republican Party sought to broadcast this ad supporting Congressman Cao before the 2008 election:

> [**45] Why We Support Cao
>
> The Republican National Committee has long stood for certain core principles, which we believe are the fundamentals of good government. When it comes to the issues of lower taxes, individual freedoms and a strong national defense, we need leaders who will stand with the American people and defend those issues.
>
> We need leaders who understand that our economy is in a recession, our individual freedoms are constantly under attack and we continue to fight the global war on terrorism to keep our families safe.
>
> Joseph Cao understands and fights for those issues. And, that is why we ask you to join us in supporting him on [*438] December 6. It's important for Louisiana and important for the

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coordination. This dissent responds fully to the former contention. As to the latter, after the past several years in litigation Cao would have to admit his awareness of the ad! In any event, it is the assertion of "content awareness" that first appeared in en banc oral argument and post-argument briefing. Timing-only is the only stipulation in the district court and therefore the only "fact" before us.

country.

Stipulated Facts ¶ 31.

The ad was produced and approved by the RNC, on its own initiative, without any input from Cao. Cao and the RNC intended to cooperate only as to the timing of the ad. Timing constituted the *only* coordination. Stipulated Facts ¶ 32. There is no evidence that Cao suggested, instigated or requested the ad. There is no evidence that he or his campaign wrote it or provided their views on its content. There is no evidence that the ad might have caused Cao to spend his campaign funds any differently. Thus, whether or not such *de minimis* coordination allows the Cao Ad to be banned as a "coordinated expenditure" is before the court for decision.

The plaintiffs raised this precise issue in their briefing. They assert that "[i]f the degree [of coordination] matters, FEC must concede that as [**46] applied to the Cao Ad coordination is *de minimis and non-cognizable.*" (emphasis added). Their contentions are best summed up as follows:

> The open question in *Colorado-II* asks both (a) whether some own-speech communications may not be regulated because coordination is *de minimis* (e.g., just timing) and (b) whether all such communications are too much like independent expenditures to be limited regardless of coordination degree. Under the former, degree matters and expenditures for the Cao Ad may not be treated as contributions. Under the latter, degree does not matter and none of RNC's proposed own-speech activities may be so treated.

Reply Brief, at 10.

Lest there be doubt, the plaintiffs' desire to run the Cao Ad without fear of prosecution or investigation permeates their initial brief to this court as it did their arguments in the district court. The plaintiffs' statement of facts asserts: "Specifically, the RNC intended to make an expressive advocacy radio ad ('Cao Ad'), if legally permitted by the judicial relief sought in this case. (R.278-79). The RNC intended to coordinate the *Cao Ad* with Cao as to the best timing for it, but otherwise it would not be coordinated with Cao."[5]

Plaintiffs' brief goes on to explain their theory about the distinction between political contributions, which the Supreme Court has held are amenable to government regulation as symbolic expressions of political support, and expenditures, which the Court considers fully protected under the First Amendment because they "communicate the underlying basis for [**47] support." *See Buckley v. Valeo,* 424 U.S. 1, 19-21, 96 S.Ct. 612, 634-35, 46 L.Ed.2d 659 (1976). The Federal Election Campaign Act treats all "coordinated expenditures" between third parties and their favored candidates as contributions, and therefore subject to rigid dollar limits.[6] Plaintiffs, however, would have this

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[5] The majority opinion is simply inaccurate in asserting that plaintiffs raised an as-applied challenge only in their reply brief.

[6] Justice Souter explained in *Colorado II* that expenditures coordinated with a candidate are contributions under FECA:

> The simplicity of the distinction [between contributions and expenditures] is qualified, however, by the Act's provision for a functional, not formal, defini-

court acknowledge the constitutional protection of "coordinated expenditures" that represent communicative [*439] statements of their reasons for supporting a candidate. Thus, they asserted broadly in their brief that communicative activities attributable to and paid for by the RNC become its "own speech" irrespective of coordination with Cao. But they also more narrowly assert that the Cao Ad is attributable to the RNC:

> [The Cao Ad] communicates the underlying basis for support for the candidate and his views, *i.e.*, it is not merely symbolic expression of support. Coordination with Rep. Cao as to timing would in no way alter the fact that this ad would be RNC's own speech. The ad is plainly more in the nature of a party's own speech than in the nature of merely paying a candidate's bills. Disbursements for it would be expenditures, not contributions. They may not be limited as if they were contributions.

[**48] Finally, plaintiffs' brief returns to the Cao Ad in the course of asserting that the government cannot sustain its burden of justifying this limit on coordinated expenditures that embody a party's political speech:

> Another reason it was difficult was that RNC couldn't have written the Cao Ad if it were an independent expenditure because, to create the

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tion of "contribution," which includes "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents," 2 U.S.C. § 441a(a)(7)(B)(i).

Colorado II, 533 U.S. at 438, 121 S.Ct. at 2356-57.

> necessary independence, "this would have had to have been made through an outside consultant"
>
> . . ..
>
> At the time RNC wanted to speak through the Cao Ad, it was not practically possible to firewall off RNC staff in order to do an independent expenditure . . ..

For all the majority's quotations intended to support their characterization of plaintiffs' broader argument as the "sole challenge," resting entirely on hypothetical grounds, there is not a word of waiver[7] by plaintiffs of any ground of relief generated by their case.[8] That plaintiffs' oral [**49] argument before this

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[7] To waive an issue, a party must have "the intention of forgoing it." BLACK'S LAW DICTIONARY (8th ed.2004); *Kontrick v. Ryan,* 540 U.S. 443, 458 n. 13, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) ("[W]aiver is the 'intentional relinquishment or abandonment of a known right.' "(quoting *United States v. Olano,* 507 U.S. 725, 773, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993))).

[8] The majority make too much of an exchange during oral argument in which plaintiffs' counsel stated that the Cao Ad was "coordinated." The majority imply that the plaintiffs conceded that the Cao Ad was a "coordinated expenditure" under *Colorado II,* and therefore *Colorado II* controls this case. This is inaccurate. When the plaintiffs stated that the Cao Ad was "coordinated," they were referring to the FEC regulations:

> Judge Jolly: In other words you can sit down and discuss with them the degree of coordination on fifty ads and you can keep running that ad and running that ad on their time. And you're running a number of ads and still it's your speech notwithstanding the nth degree of coordination that you had.

court is broadly phrased is hardly a novel tactic, especially when the line between facial and as-applied challenges to statutes is "not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United,* 130 S.Ct. at 893. The district court, however, was well aware that plaintiffs' object is to obtain a ruling that defines, or begins to define, where certain coordinated activities of the RNC with Congressman Cao lie along the spectrum running from "functional monetary contributions" to full-[*440] throated political advocacy.[9] The specifically defined activity here was the production and planned broadcast of the Cao Ad. Having raised this issue in the district court and to this court, the plaintiffs are entitled to an answer.

> Plaintiff's Counsel: That's right. There's no degree of being pregnant. You're either or not, and **under their regulations,** it is. . . .

(emphasis added). Counsel conceded only FEC's regulatory interpretation of the consequences of timing-only coordination, *not* the constitutionality of that interpretation.

[9] Judge Berrigan's order cites both *Colorado II*'s majority opinion and Justice Thomas's dissent, explaining that several "coordinated" activities are not equivalent to *de facto* contributions, but instead are genuine expenditures with only a minimal amount of coordination. *Cao v. FEC,* 688 F.Supp.2d 498, 539-40 (E.D.La.2010). Relying on this discussion, the order rejects the FEC's motion for summary judgment, stating that "where a coordinated expenditure explicitly conveys that underlying basis, it arguably becomes less symbolic and begins to look more like a 'direct restraint on . . . political communication.' " *Id.* at 541 (quoting *Buckley,* 424 U.S. at 21, 96 S.Ct. at 636.)

II. The Court Must Address Narrow Issues First

The majority hardly need reminding of the cardinal principle of constitutional adjudication that a court should address the case presented by [**50] the facts before it rather than broad, hypothetical scenarios. Courts should neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. TVA*, 297 U.S. 288, 346-47, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J.) (quoting *Liverpool, N.Y. & Philadelphia Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885)); *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 450-51 128 S.Ct. 1184, 1191 (2008). Going beyond our "case or controversy" limits spawns advisory opinions that are likely to be ill-informed.

The majority opinion falls into this trap. Rather than address the stipulated facts about the Cao Ad, which have been fairly "passed upon" in the parties' briefs and by the district court, the majority considers the application of *Colorado II* to all "speech" "adopted by a political party." The majority propose an answer to the broadest possible question before the court, extending the reach of their decision well beyond the factual record. Their overbroad approach leads to at least one serious mistake as they conflate the plaintiffs' "own speech" argument with every conceivable "expenditure" whose "coordination" is deemed by FECA to be the functional equivalent of a simple monetary contribution. Thus, they conclude, adopting the "own speech" argument would "effectually overrule" the Supreme Court's decision in [**51] *Colorado II* that

facially upheld dollar limits on coordinated expenditures. This is plainly wrong.

The Supreme Court,[10] the district court,[11] the plaintiffs[12] and the FEC[13] all [*441] recognize that "coordinated expenditures" range on a spectrum from those that are more independently communicative of a supporter's views to those more like money contributions, which *Buckley v. Valeo* characterizes as mere symbolic expression. The majority employs a meat cleaver in-

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[10] *Colorado II,* 533 U.S. at 445, 121 S.Ct. at 2360 ("Coordinated spending by a party, in other words, covers a spectrum of activity, as does coordinated spending by other political actors."); *Id.* at 467-68, 121 S.Ct. at 2372-73 (Thomas, J. dissenting) ("This definition covers a broad array of conduct, some of which is akin to an independent expenditure.").

[11] *Cao,* 688 F.Supp.2d at 539-40.

[12] Appellants' Reply Brief, at 10.

[13] The FEC conceded that the Cao Ad would be at the outer reaches of the FEC's regulatory authority:

> Judge [Clement]: Where do you think the Cao ad falls on the spectrum of coordinated expenditures, with respect to first amendment rights?
>
> FEC Counsel: Well, I think in terms of–
>
> Judge [Clement]: Is it within the heartland or is it–
>
> FEC Counsel: I think it's towards the outer boundary, because timing is–
>
> Judge [Clement]: Which outer boundary?
>
> FEC Counsel: The outer boundary of what would be regulable. Because obviously, if it's just about timing there are other things that would make it even more valuable to a candidate such as being able to control more specifically the message itself.

stead of a scalpel in the most sensitive constitutional area of political speech.

[**52] The majority's overbreadth is even more disturbing because the Supreme Court proceeded with constitutional caution in the political contribution cases that concern us here. In *Colorado I*, the Court, rejecting the FEC's meat cleaver approach that would have deemed all political party expenditures as "coordinated" with candidates, upheld an as-applied challenge allowing independent expenditures. *Colorado Republican Campaign Comm. v. FEC*, 518 U.S. 604, 623-24, 116 S.Ct. 2309, 2319, 135 L.Ed.2d 795 (1996) ("*Colorado I*"). The Court then remanded for fuller consideration of the party's facial challenge to FECA's coordinated expenditure provision. *Id.* at 625-26, 116 S.Ct. at 2320-21. When the Court later took up and rejected the facial challenge in *Colorado II*, it nonetheless acknowledged a potential for future as-applied attacks:

> Whether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on application of the limit to specific expenditures is a question that, as Justice Thomas notes, post, at 468, n. 2 [121 S.Ct. 2351], we need not reach in this facial challenge. *Cf.* Brief for Petitioner 9, n.5 (noting that the FEC has solicited comments regarding possible criteria for identifying coordinated expenditures).
>
> The Party appears to argue that even if the Party Expenditure Provision is justified with regard to coordinated expenditures that amount to no more than payment of the candidate's bills, the limitation is facially invalid because of

> its potential application to expenditures that involve more of the party's own speech. Brief for Respondent 48-49. But the Party does not tell us what proportion of the spending falls in one category or the other, or otherwise lay the groundwork for its facial over breadth claim. Cf. [**53] *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (overbreadth must be substantial to trigger facial invalidation).

Colorado II, 533 U.S. at 456, 121 S.Ct. at 2366 n. 17.

Thus, the Court majority expressly recognized, as did the dissent, the potential for as-applied challenges to coordinated expenditures that express the contributor's basis for supporting a candidate. *See also Colorado II*, 533 U.S. at 468, 121 S.Ct. at 2373 (Thomas, J. dissenting).[14] The litigation [*442] history of the *Colo-*

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[14] Justice Thomas explained:

> The Court makes this very assumption. See *ante*, at 464, 121 S.Ct. 2351 ("There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate"). To the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures remains unresolved. See, *e.g.*, *ante*, at 456, n. 17, 121 S.Ct. 2351. At oral argument, the Government appeared to suggest that the Party Expenditure Provision might not reach expenditures that are not functionally identical to contributions. See Tr. of Oral Arg. 15 (stating that the purpose of the Party Expenditure Provision is simply to prevent

rado case demonstrates the Court's methodical migration from a narrow to a broader challenge of the FECA provision.

The Court took a similar approach in *Citizens United*. It first analyzed the plaintiffs' arguments that *Hillary: The Movie* did not fall within statutory prohibitions on corporate electioneering communications and, only after rejecting those, reached the ultimate constitutionality of the ban. Chief Justice Roberts explained:

> It is only because the majority rejects Citizens United's statutory claim that it proceeds to consider the group's various [**54] constitutional arguments, beginning with its narrowest claim (that *Hillary* is not the functional equivalent of express advocacy) and proceeding to is broadest claim (that *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) should be overruled). This is the same order of operations followed by the controlling opinion in *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (*WRTL*). There the appellant was able to prevail on its narrowest constitutional argument because its broadcast ads did not qualify as the functional equivalent of express advocacy; there was thus no need to go on to address the broader claim that *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), should be overruled. *WRTL*,

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someone "from making contributions in the form of paying the candidate's bills").

> 551 U.S., at 482, 127 S.Ct. 2652, 168 L.Ed.2d 329; *id.*, at 482-483, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (ALITO, J., concurring). This case is different-not, as the dissent suggests, because the approach taken in *WRTL* has been deemed a "failure," *post,* at 935 [130 S.Ct. 876], but because, in the absence of any valid narrower ground of decision, there is no way to avoid Citizen United's broader constitutional argument.

Citizens United, 130 S.Ct. at 918 (Roberts, C.J., concurring). The Chief Justice also noted that the *WRTL* decision rested on a narrower constitutional basis.

The majority's approach cannot be salvaged by their re-characterization of the plaintiffs' "own speech" argument as a "facial attack" no different from the one rejected by the Supreme Court in *Colorado II.* It is true that the line between facial and as-applied constitutional challenges is not well defined. *Citizens United,* 130 S.Ct. at 893. But it is also true that courts have the authority to re-frame these arguments to subserve judicial [**55] restraint[15] and in recognition that the distinction "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Id.* (Kennedy J.) (citing *United States v. Nat Treas. Emp's Union,* 513 U.S. 454, 477-78, 115 S.Ct. 1003, 1018-19, 130 L.Ed.2d 964 (1995)).[16] It

[15] *Citizens United,* 130 S.Ct. at 918 ("If there were a valid basis for deciding this statutory claim in Citizens United's favor (and thereby avoiding constitutional adjudication), it would be proper to do so.").

[16] The courts of appeals have followed this approach, focusing on the factual allegations underlying the challenge. The Second Circuit explained in *Ramos v. Town of Vernon,*

follows from [*443] these principles that the parties "cannot enter into a stipulation that prevents the

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353 F.3d 171 (2d Cir.2003):

> The present case has never been explicitly characterized as either facial or as-applied. Rather, plaintiffs' complaint without specificity alleges the ways the ordinance has infringed on their rights in their specific circumstances, and then asks for relief. While some of the claims plaintiffs raise are logically analyzed as facial challenges, e.g., the challenges for overbreadth and vagueness, the equal protection claim is more logically viewed "as-applied" given the statements in the complaint. Even if a facial challenge was intended, a facial challenge in the context of the present equal protection claim would logically include within it an as-applied challenge, and thus we cannot ignore the constitutional violation simply because the words "as-applied" were not used.

Id. at 174 n. 1 (citation omitted).

Similarly, in *Jacobs v. Florida Bar*, 50 F.3d 901 (11th Cir.1995), the Eleventh Circuit explicitly recharacterized a challenge based on the facts before it where the appellants were unable to carry a broader facial attack on rules restricting attorney advertising:

> We recognize that Appellants characterized their claim as a facial challenge. We are not, however, bound by Appellants' designation of their claims, as the complaint sets forth a cause of action for an as-applied challenge to the rules. *See McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir.1994) (en banc) ("Our responsibility, however, is to examine [plaintiff's] cause of action for what it actually is, not for what [plaintiff] would have it be," and thus court looks to complaint to determine what claim plaintiff's allegations support) . . . .

Id. at 905 n. 17.

[**56] Court from considering certain remedies if those remedies are necessary to resolve a claim that has been presented." *Citizens United, Id.* at 893.[17] Thus, it is improper for the majority to conclude that plaintiffs have somehow pled or argued themselves out of court. Recharacterizing the plaintiffs' position as a facial attack cannot eliminate the narrower issue concerning the Cao Ad.

This court has the duty to decide the case on stipulated facts brought properly before us.

III. Evaluating Cao's As-Applied Challenge

In this as-applied attack on the coordinated expenditure limit that would ban broadcast of the Cao Ad, this court must first determine the appropriate level of scrutiny and then evaluate the evidence concerning the government's regulation. *WRTL,* 551 U.S. at 456, 127 S.Ct. at 2659 ("With the standard [of scrutiny] thus settled, the issue remains whether adequate evidentiary grounds exist to sustain the limit under that standard[.]"). Two levels of scrutiny govern campaign finance regulations: strict scrutiny and, unique to campaign finance jurisprudence, "closely drawn" scrutiny. *Buckley v. Valeo,* 424 U.S. 1, 25, 96 S.Ct. 612, 638, 46 L.Ed.2d 659 (1976). The former has been applied to candidates' speech and independent expenditures, while the latter applies to contributions and facially to "coordinated expenditures." Which [**57] standard pertains to the government's regulation of the Cao Ad depends on whether the ad is core political speech (*see Citizens United,* 130 S.Ct. at 890-91), or a

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[17] In *Citizens United,* the Court ignored the plaintiffs' stipulation foreswearing an attack on the corporate contribution ban. 130 S.Ct. at 892-93.

functional contribution. This court is not bound by the government's simply labeling the speech "coordinated":

> [W]e recognize that the FEC may have characterized the expenditures as "coordinated" in light of this Court's constitutional decisions prohibiting regulation of most independent expenditures. But, if so, the characterization cannot help the Government prove its case. **An agency's simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one.** *See, e.g., NAACP v. Button,* 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (the government "cannot foreclose the exercise of constitutional rights by mere labels"); *Edwards v. South Carolina,* 372 U.S. 229, 235-238, 83 S.Ct. 680, 9 [*444] L.Ed.2d 697 (1963) (State may not avoid First Amendment's strictures by applying the label "breach of the peace" to peaceful demonstrations).

Colorado I, 518 U.S. at 621-22, 116 S.Ct. at 2319 (emphasis added).

Buckley held that contributions to a candidate may be regulated, because contributions, unlike communicative independent expenditures, express merely a general support for a candidate. *Buckley,* 424 U.S. at 21, 96 S.Ct. at 635. The FECA defines contributions as including "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate." 2 U.S.C. § 441a(a)(7)(B)(i). While the Supreme Court has placed great importance on whether speech is coordinated, and thus regarded as a contribution, it has offered no guidance [**58] except to acknowledge that the sweeping term

"coordinated expenditures" covers a wide range of activities with varying constitutional attributes:

> The principal opinion in *Colorado I* noted that coordinated expenditures "share some of the constitutionally relevant features of independent expenditures." 518 U.S., at 624 [116 S.Ct. 2309]. But it also observed that "many [party coordinated expenditures] are . . . virtually indistinguishable from simple contributions." *Ibid.* Coordinated spending by a party, in other words, covers a spectrum of activity, as does coordinated spending by other political actors.

Colorado II, 533 U.S. at 444-45, 121 S.Ct. at 2361.

There is no doubt that, standing alone, the Cao Ad is core political speech. The Cao Ad is more than "a general expression of support for the candidate." *Buckley*, 424 U.S. at 21, 96 S.Ct. at 635; *see also Citizens United*, 130 S.Ct. at 890 ("[T]here is no reasonable interpretation of *Hillary* [the movie] other than as an appeal to vote against Senator Clinton, . . . [T]he film qualifies as express advocacy."). The ad expressly advocates for Cao, "communicate[s] the underlying basis for [the RNC's] support," and increases "the quantity of communication." *Buckley*, 424 U.S. at 21, 96 S.Ct. at 635.

Further, the ad hews closely to the independent expenditure side of the spectrum. The RNC independently produced the Cao Ad without input from Cao; the RNC created the ad at its own initiative; the RNC planned the ad's message; the RNC produced the ad; the RNC approved the final version of the ad; and the RNC decided to air the ad. Like the ads in *Colorado I*, the [**59] Cao Ad "was developed by the [party] independently and not pursuant to any general or

particular understanding with a candidate." *Colorado I,* 518 U.S. at 614, 116 S.Ct. at 2315.[18] It unambiguously "reflects [the RNC's] members' views about the philosophical and governmental matters that bind them together [and] also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure." *Id.* at 615-16, 116 S.Ct. at 2316.

At the opposite end of the coordination spectrum are instances in which a party [*445] simply pays its candidate's bills. *See Buckley,* 424 U.S. at 46, 96 S.Ct. at 648 n. 53; *see also Colorado I,* 518 U.S. at 624, 116 S.Ct. at 2320. Apparently rejecting the spectrum approach, the FEC asserts that the Cao Ad is functionally the same as a cash contribution to the candidate. This is inaccurate. The critical differences between the Cao Ad and a direct contribution or "footing the candidate's bills" include the ad's initiator, message, quality, ultimate source of approval, and decision to air. The Cao Ad is not "virtually identical" to one that Cao might produce. *See Cao,* 688 F.[**60]Supp.2d at 533 (explaining that Cao found many independent expenditures to be counterproductive and harmful). Further,

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[18] *Colorado I* listed several features of an "independent expenditure" which pertain to this inquiry: (1) Whether the party independently decided to create the ad on its own initiative; (2) Whether the party independently developed the ad; (3) Whether the party's leadership independently approved the ad; (4) Whether the party independently decided to circulate the ad; (5) Whether the party claims ownership of the ad within the ad itself; (6) Whether, when viewed objectively, the ad is appears to be the party's own. *Colorado I,* 518 U.S. at 613-14, 116 S.Ct. at 2315.

despite the timing coordination, the ads "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Buckley,* 424 U.S. at 47, 96 S.Ct. at 648. Because the party decides to create and air the ad of its own initiative, the candidate cannot depend on it. The candidate will not know whether the ad is effective. If the ad is useful to the candidate, then it is useful only because the interests of the party and the candidate coincide. On all these grounds, there is no significant functional difference between the Cao Ad and a constitutionally protected independent expenditure.

Compared with the *Colorado II* pronouncement that the coordinated expenditure limits are facially valid, this case presents the narrow question whether *de minimis* coordination transforms otherwise constitutionally protected core political speech into something less. We believe it does not. Because the Cao Ad represents core political speech, it should be evaluated under the traditional strict scrutiny test. *See Colorado II,* 533 U.S. at 443-44, 121 S.Ct. at 2360; *Colorado I,* 518 U.S. at 614-15, 116 S.Ct. at 2315;. Alternatively, even if "closely drawn" scrutiny is required because of *Colorado II,* the Cao Ad cannot be subjected to dollar limits.

[**61] A. Applying Strict Scrutiny

That a statute has been held facially valid does not answer whether it may be constitutionally applied in a specific circumstance. *WRTL,* 551 U.S. at 464, 127 S.Ct. at 2663-64. Instead "[a] court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech." *WRTL,* 551 U.S. at 464-65, 127 S.Ct. at 2664; *id.* at 477-78, 127 S.Ct. at 267; *See also Citizens United,* 130

S.Ct. at 898, 130 S.Ct. 876 (justifying regulation of speech "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." (internal quotation marks omitted)); *First Nat'l. Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978). Moreover, the government bears the burden to demonstrate that the law is constitutional as applied to plaintiffs' speech. *WRTL*, 557 U.S. at 464, 127 S.Ct. at 2663.

The government contends that regulating timing-only coordination furthers its compelling interest in preventing corruption or its appearance or circumvention of the contribution limits. The FEC also argues that an expansive definition of "coordination" is necessary to ensure that it can regulate all coordinated expenditures that truly are *de facto* contributions. But because the Cao Ad represents expressive political speech, the government's position cannot be squared with *WRTL*:

> [**62] This Court has long recognized "the governmental interest in preventing corruption and the appearance of corruption" in election campaigns. *Buckley*, 424 U.S., at 45, 96 S.Ct. 612, 46 L.Ed.2d 659. This interest has been invoked as [*446] a reason for upholding *contribution* limits. As *Buckley* explained, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.*, at 26-27, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659. We have suggested that this interest might also justify limits on elec-

tioneering *expenditures* because it may be that, in some circumstances, "large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions." *Id.*, at 45, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659.

McConnell arguably applied this interest—which this Court had only assumed could justify regulation of express advocacy—to ads that were the "functional equivalent" of express advocacy. *See* 540 U.S. at 204-206, 124 S.Ct. 619, 157 L.Ed.2d 491. But to justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech.

Appellants argue that an expansive definition of "functional equivalent" is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions. *Cf. McConnell, supra,* at 205, 124 S.Ct. 619 ("[R]ecent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against circumvention of [valid] contributions limits" (internal quotation marks omitted; brackets in original)). But such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny.

WRTL, 551 U.S. at 478-79, 127 S.Ct. at 2672.

The import of *WRTL* is clear. Even if the record afforded some support for regulating timing-only coordination, which it does not, discussed *infra*, it [**63] clearly does not support treating the Cao Ad as the "functional equivalent" of a mere monetary contribution. The expressive content of the ad prevents that. In addition, the risk of circumvention of campaign contribution limits is not appreciably greater here than it is with "independent" expenditures. The candidate lacks control or influence over the initiation, production, and content of the party ad. The party decides whether or not an ad will be made, what it will say, what it will look like, and whether it will air. The candidate may or may not approve of the ad or find it useful.

Consequently, this expenditure will be useful to the candidate only to the extent that his and the party's interests coincide. Should the candidate "encourage" donors to give money to the party, he cannot be certain whether these party donations will be more useful to him than an independent expenditure. Without some link of candidate control or influence, neither the *quid pro quo* corruption nor appearance of corruption that justifies contribution limits can occur. *Colorado II*, 533 U.S. at 464, 121 S.Ct. at 2370 (discussing a "link in a chain of corruption by-conduit"); *Citizens United*, 130 S.Ct. 876, 908 (preventing corruption or its appearance is the government's only valid interest in limiting political speech).

The FEC essentially argues, as it did in *WRTL*, that expansive definitions of coordination and coordinated expenditures are [*447] needed to ensure that coordinating solely the broadcast timing of the party's ad

does not [**64] circumvent the rule against coordinated expenditures which in turn helps to prevent circumvention of contribution limits which culminates in preventing quid pro quo corruption or the appearance of such corruption. This is no more than the "prophylaxis-upon-prophylaxis" speculation rejected by *WRTL*, 551 U.S. at 479, 127 S.Ct. at 2672. It is an overly broad approach that here sweeps up protected speech. And the government's logic, that the greater coordination includes the lesser (this coordination), is unambiguously rejected by *WRTL:* "This greater-includes-the-lesser approach is not how strict scrutiny works . . . A court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech." 551 U.S. at 477-78, 127 S.Ct. at 2671.[19]

B. Applying "Closely Drawn" Scrutiny

Even if the regulation of the Cao Ad must be evaluated under *Buckley*'s "closely drawn" standard because of its *de minimis* coordination, the government *still* must affirmatively demonstrate some sufficiently important interest–preventing corruption, the appearance of corruption, or circumvention. *Buckley*, 424 U.S. at 25, 96 S.Ct. at 638 (contribution limits may be upheld only if the "*[s]tate demonstrates* a sufficiently important [**65] interest and employs means closely

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[19] In a case concerning the criminalization of virtual child pornography, a subject deserving far less First Amendment scrutiny, the Court rejected a similar contention, stating, "[T]hat protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S.Ct. 1389, 152 L.Ed.2d 403, (2002).

drawn to avoid unnecessary abridgment of associational freedoms" (emphasis added)); *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993) (when regulating speech under intermediate scrutiny, the government must "demonstrate that the harms it recites are real" and that standard is "not satisfied by mere speculation or conjecture.") The government remains obliged to present evidence that the interest applies to the facts before us. *McConnell v. FEC*, 540 U.S. 93, 144, 185 n. 72, 124 S.Ct. 619, 661, 684, 157 L.Ed.2d 491 (2003); *Colorado II*, 533 U.S. at 457, 121 S.Ct. at 2367. Not to require some level of proof by the government would allow censorship of the party's ad based on nothing more than the general proof offered to sustain the statute's facial validity in *Colorado II*.

The FEC offered *no* evidence or argument that coordination of the Cao Ad as to broadcast timing will appreciably increase the risk or appearance of corruption or circumvention of contribution limits. The record contains fifty-nine exhibits spanning thousands of pages, much of which was part of the record in *Colorado II* or *McConnell*. There are academic studies, expert testimony before Congress, invitations to various events put on by political parties, and many affidavits by politicians, former politicians, and political advisors. Overall, the record evidence proves that money plays a primary role in political campaigns, that parties and party leaders are significantly involved in political fund-raising, and that independent groups have played [**66] an increasing role in recent years. More money than ever is being raised, and election advertising has become more important and more of a science than ever before. Frequently, this money, whether it travels

through campaigns, parties, or independent groups, opens up opportunities for access [*448] to candidates and politicians. In short, despite FECA, as amended by McCain-Feingold, money and politics remain inextricably linked, and may be more entangled than they were at the time of FECA's passage.[20]

None of this, however, demonstrates that the specific type of coordination at issue in this case, concerning the timing of otherwise-independent expenditures, has any propensity to increase *quid pro quo* corruption or the appearance of corruption or to promote circumvention of contribution limits. Indeed, the voluminous evidentiary record contains only a few, incidental references to timing coordination. For example, a campaign finance expert opines that "Giving candidates a direct say in whether, when, and how

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[20] The majority is "shocked" to note that the major political parties spent well over $100 million apiece on independent expenditures during the 2008 election. To the contrary, this is not an exorbitant sum. To put this amount in perspective, consider that a mere 24 individuals contributed a total of $142 million to tax-exempt 527 organizations in 2004 and that 527 and 501(c) groups spent more than $400 million in the 2008 federal elections. S. Weissman and R. Hassan, *BCRA and the 527 Groups*, in THE ELECTION AFTER REFORM 79, 92-96 (M. Malbin ed.2006); Press Release, Campaign Finance Inst., Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election (Feb. 25, 2009), *available at* http://www.cfinst.org/Press.aspx. Even this amount of money is a trifle in the world of marketing. A single corporation, Procter & Gamble, annually spends $2.7 billion on advertising to promote its products in the United States. Suzanne Vranica & San Schechner, *P&J Signs Ad Deal*, WALL ST. J., April 22, 2010, at B6.

often a party's speech is broadcast essentially gives them a direct [**67] say in the content of what the voters get to hear." Content, however, is not at issue in this case. A former politician states that party advertisements in the final days of a campaign can make the difference between winning and losing. Coordination is hardly necessary to draw that conclusion. One campaign consultant complained that "the clutter on television during the last few weeks of the campaign really prevented our message from getting through as clearly as we would have liked." No doubt. What is absent from the record is any discussion or evaluation (let alone evidence) *on whether timing coordination increases the risk of corruption or its appearance.* Instead, the record simply includes blanket conclusions that *any* coordination increases the risk.

In contrast, the general evidence demonstrating risks of circumvention presented in *Colorado II* involved situations where the candidate retained real control over the party's coordinated expenditures. Candidates controlled the message and its presentation and, ultimately, approved of those coordinated expenditures. *See* 533 U.S. at 457-60, 121 S.Ct. at 2367-68. Here, Cao had no influence over the RNC's speech save what time it would air. The candidate does not even have input into whether or on what stations the ad will air, only when it will air, and he cannot be certain that the party will heed his advice. If there is any heightened possibility of corruption or circumvention in this arrangement, the government has not pointed to it, and [**68] we ought not to invent some conceivable interest that the government itself is unable to articulate or prove.

Nor, in this instance, are entirely uncoordinated

expenditures an adequate alternative to minimally coordinated speech. The record demonstrates that FEC's coordination-regulation regime prevents party leaders from exercising any degree of control over their party's advertisements in support of a candidate.[21] Because party [*449] leaders inevitably associate with candidates, to avoid the taint of coordination parties must establish "independent expenditure programs" staffed by hired consultants who are responsible for all aspects of the party's communications, from polling and research to writing the scripts, but for the topline budget. In effect, a party has no control over its own

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[21] The district court found:

49. Because the RNC has a continuous and ongoing relationship with its candidates, special measures must be taken to do independent expenditures regarding its candidates. The RNC has extensive discussions with its candidates about their needs, activities and strategy. As a result, activities by the RNC about its candidates may be deemed to be coordinated with its candidates, subjecting these activities to the FECA's coordinated expenditure and contribution limits. In order to engage in any independent expenditure supporting one of its candidates, the RNC may hire an outside consulting group to do the independent expenditures but neither the RNC nor any of its officers, employees or agents may have any involvement in the independent expenditure in order for it to be truly independent. *In fact, neither the chairman of the RNC nor any of the RNC's officers, employees or agents has control over the message of an independent expenditure yet the RNC bears responsibility for that message. The RNC makes its independent expenditures in this way out of a belief that there is no way to have a true "firewall policy."* (Emphasis added).

message. The party leaders must make a Hobson's choice between talking to their own candidates and controlling their own party's message. The government justifies this regime [**69] by reference to the risk of "circumvention." But by prohibiting speech subject to *de minimis* coordination, the FEC severely abridges parties' constitutionally protected right to engage in independent expenditures-in other words, to speak in public in support of their own candidates. After *Citizens United,* a party is more constrained in its ability to engage in political speech than a run-of-the-mill business or corporation.

"Closely drawn" scrutiny has to mean *something* when applied to censorship of core political speech. Where the government cannot demonstrate a compelling interest, and the effect of regulation in this case is to ban the Cao Ad, the regulation cannot be "closely drawn."

IV. The Majority Opinion

Even taking the majority on their own terms, *Colorado II* does not foreclose the plaintiffs' broader "own speech" argument. As we have noted, the majority's analysis of the plaintiffs' "own speech" argument simply misses the point: it is *speech,* not pencils, that the RNC has paid for. The spectrum of expenditures that may be coordinated with a candidate is potentially limitless. Coordinated expenditures that are functionally like monetary contributions, and are only symbolically expressive according to *Buckley*'s dichotomy, continue to fall comfortably within the range in which monetary limits must be upheld to prevent quid pro quo corruption or the appearance of such corruption. Consequently, the majority's fear that the bottom would fall [**70] out of FEC regulation of coordinated

expenditures if RNC succeeds here is groundless.

Second, because the Cao Ad is undeniably core political speech, the majority is incorrect to dismiss the two most recent cases in which the Supreme Court has addressed whose communicative speech may be constitutionally limited and in what way. Neither *Citizens United* nor *WRTL* controls the present case, but both are informative; their bedrock defense of core political speech and their systematic approach to First Amendment standards of review cannot be waved away by reciting differences in degree, not kind, between the speakers and types of speech at issue. Finally, the majority's treatment of plaintiffs' "own speech" argument erases the distinction between facial and as-applied challenges. If the Cao Ad must be banned [*450] as a coordinated expenditure, despite its provenance and character as core political speech, the majority opinion "eviscerates" both the acknowledgment in *Colorado I* and *II* of the wide spectrum of potentially coordinated expenditures and the recognition in *Colorado II* that as-applied challenges were foreseeable. In short, the plaintiffs may have reached beyond the grasp of judicial power by promoting a largely hypothetical "own speech" position. The majority, however, seriously abdicated their responsibility to protect First Amendment political speech and to apply governing Supreme Court authorities.

[**71] V. Conclusion

The constitutional rules governing campaign finance law are presently in a state of flux, *see Green Party of Conn. v. Garfield,* 616 F.3d 189, 2010 WL 2737134 (2d Cir. July 13, 2010), but there is a clear trend favoring the protection of political speech. Beginning with *WRTL,* the Supreme Court has, in

measured steps, protected political speech while leaving the scaffolding of *Buckley* in place. It has cast aside both recently enacted speech restrictions, *see WRTL,* and decades-old speech restrictions, *see Citizens United.* Lower courts have conformed to this trend. *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C.Cir.2010); *N.M. Youth Organized v. Herrera,* 611 F.3d 669 (10th Cir.2010).

In each of those instances, the Supreme Court has demanded, to justify banning speech, that the government provide strong evidence of a compelling interest in preventing the appearance or occurrence of corruption. Where there is uncertainty about the government's interest, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *WRTL,* 551 U.S. at 457, 127 S.Ct. at 2659. Like Wisconsin Right to Life's issue ads or Citizen United's *Hillary: The Movie,* the Cao Ad is core political speech. The RNC wishes to coordinate with Cao on its broadcast timing, but the Supreme Court has never spoken on what degree of contact makes expressive political speech "coordinated" such that it may be [**72] suppressed. The Supreme Court's recent decisions demand much more from the government than it has presented here-essentially nothing. Even if the government were to meet its burden, it seems inconceivable that in this country founded on the hope and reality of free and open political debate, otherwise independent political speech could be banned because its speakers have asked a candidate, "When do we air the ad?"

It is not our place to revisit whether the government may generally regulate coordinated expenditures. Still less is it our place to approve the banning of a

specific political ad simply because the Court has held that when coordinated expenditures are generally analogous to paying the candidates's bills, they may be regulated. But when it comes to defining what speech qualifies as coordinated expenditures subject to such regulation-the issue we *do* have to decide-we should follow Chief Justice Roberts's admonition in *WRTL*:

> [W]e give the benefit of the doubt to speech, not censorship. The First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech" demands at least that.

WRTL, 551 U.S. at 482, 127 S.Ct. at 2674.

We respectfully dissent.

[**73] EDITH BROWN CLEMENT, Circuit Judge, with EDITH H. JONES, Chief Judge, and JERRY E. SMITH and JENNIFER WALKER ELROD, Circuit Judges, concurring in part and dissenting in part:

I join the Chief Judge's dissent because I believe the Party Expenditure Provision [*451] cannot be constitutionally applied to the Cao ad. I write separately to note that I would go further than the Chief Judge in fashioning a standard that protects political speech that is not the functional equivalent of a campaign contribution.

The Chief Judge and I agree on much. We agree that this as-applied challenge is not, as the majority erroneously assumes, foreclosed by *Federal Election Commission v. Colorado Republican Campaign Committee,* 533 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) ("*Colorado II*"). We also agree that the court's task is to fashion a standard for determining whether a coordinated expenditure is the functional equivalent

of a contribution, and that *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) ("*WRTL*"), provides guidance about what that standard ought to look like. We agree that coordination merely as to timing does not make the Cao ad the functional equivalent of a contribution and that the ad is accordingly protected by strict scrutiny. Finally, we agree that the government's asserted interest in banning this ad does not survive such scrutiny.

However, I see no reason that timing alone makes any difference in the constitutional analysis, and question whether a *de minimis* standard provides a line bright enough to avoid chilling protected speech through the threat of an enforcement action. The Supreme Court has drawn the relevant distinction between an expenditure and a contribution: a contribution "serves as a general expression of support for the candidate and his views," while an expenditure "communicate[s] the underlying basis for the support." *Buckley v. Valeo,* 424 U.S. 1, 21, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The Court has also identified the goal of the anti-coordination rules: preventing circumvention of the contribution limits by expenditures that [**74] amount to simply paying a candidate's bills. *See Buckley,* 424 U.S. at 47 n. 53, 96 S.Ct. 612 (noting that an expenditure is not coordinated if it is "incurred without the request or consent of a candidate or his agent") (citing H.R. REP. No. 93-1239 at 6 (1974)); *see also Colorado II,* 533 U.S. at 457-60, 121 S.Ct. 2351 (describing circumvention); *Colo. Republican Campaign Comm. v. Fed. Election Comm'n,* 518 U.S. 604, 624, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) ("*Colorado I*") (describing expenditures that are "virtually indis-

tinguishable from simple contributions"). A "timing only" standard does nothing to capture the difference between these two constitutionally distinct forms of communication. The same could be said of other standards based on the manner of coordination, such as medium (radio versus television); venue (the local Spanish-language channel versus the soft rock channel); or region (the Lower Ninth Ward versus Uptown New Orleans).

Likewise, a *de minimis* standard is difficult to apply and interpret. The FEC would be required to develop extensive regulations drawing lines between *de minimis* and prohibited coordination. Courts attempting to adjudicate the application of these regulations to specific factual situations would find themselves drawn into similar hair splitting. Litigants would be forced to respond to extensive discovery on the substance of their contacts with the candidate. A speaker contemplating engaging in speech such as the Cao ad would face a "burdensome, expert-driven inquiry, with an indeterminate result." *WRTL*, 551 U.S. at 469, 127 S.Ct. 2652. Despite the best intentions of such a standard, "it will unquestionably chill a substantial amount of political speech." *Id.*

What does make a difference in the constitutional analysis, however, is coordination [*452] as to the content of the ad. The Cao ad is the RNC's own speech, expressing *its* views on political issues, and identifying Cao as a candidate who supports those views. Cao did not provide input on its content and was not asked to provide his consent to run the ad. If he had, that would indeed raise a suspicion that the parties were attempting to circumvent the rules against [**75] coordination so that the RNC could pay the bill for *Cao's* speech—

the evil at which the coordination rules are aimed.[1]

Accordingly, I would propose a two-pronged standard that is "content-driven," rather than one that turns on the degree of coordination. Specifically, I would propose the following: An advertisement is functionally identical to a contribution only if it is susceptible of no other reasonable interpretation than as a general expression of support for the candidate, *and* the ad was not generated by the candidate. Under this standard, the speaker could only take refuge in the safe harbor of a content-driven standard if the speech conveys the underlying basis of the support, and was not merely adopted speech indistinguishable from paying a candidate's advertising bills. This approach shares all the characteristics of the standard the Court adopted in *WRTL*: it is clear, objective, and content-driven, and because it is relatively simple for both speakers and regulators to understand and apply, will

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[1] The majority argues that what it calls "timing-plus-content-awareness coordination" raises "exactly" the same circumvention concerns as if Cao had provided input on the content of the ad or given his permission for the ad to run. Maj. Op. at 432-33. This is not the case. Once again, the majority refuses to analyze this ad along the lines the Court demands: whether it is merely a general expression of support for the candidate versus one that communicates the underlying basis for the support. *Buckley*, 424 U.S. at 21, 96 S.Ct. 612. Such analysis distinguishes the Cao ad from a communication generated by Cao that the RNC pays to have broadcast. Furthermore, the majority's approach is precisely that rejected by the Court in *WRTL:* the "prophylaxis-upon-prophylaxis" approach of banning protected speech because that makes it easier to ban unprotected speech. 551 U.S. at 479, 127 S.Ct. 2652. To quote the Court: "Enough is enough." *Id.* at 478, 127 S.Ct. 2652.

not chill speech through the threat of litigation. It limits discovery to a factual issue that is relatively easy to ascertain, *i.e.*, whether the ad was generated by or its content approved by the candidate or the political party. It references the fundamental distinction the Court drew between contributions and expenditures in *Buckley*, and exempts from its protection expenditures that amount to a party merely paying a candidate's bills. The standard would also align more closely than other possible standards with the actual definition of a coordinated expenditure, which [**76] prohibits spending "*at the request or suggestion of*, a candidate." 2 U.S.C. § 441a(a)(7)(B)(I) (emphasis added).

Applying this standard, the Cao ad is not functionally identical to a campaign contribution. The ad was generated by the RNC. It expresses not merely the kind of generalized sentiment–"Vote for Joseph Cao"–that the Court has described as the hallmark of a contribution, but expresses the RNC's view on important matters of public concern and urges a vote for Cao because he shares the same views. While the "take-away" message of this advertisement may be one urging support for Cao, the message is anchored and inspired not by the RNC's support for Cao, but by Cao's support for the views expressed by the RNC. The ad thus communicates the underlying basis for the support, making it more like an expenditure protected by strict scrutiny. This is far from the archetypal coordination described [*453] in *Buckley*: effectively paying a candidate's advertising bills. The Cao ad can reasonably be interpreted as something other than a general expression of support for a candidate and was not generated by Cao, and as such, strict scrutiny should apply to laws regulating this ad.

Most importantly, this standard is faithful to what I take to be the central lesson of *WRTL*: that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." 551 U.S. at 474, 127 S.Ct. 2652. Like the advertisements in *WRTL*, the Cao ad is indisputably political expression, one that in any other context would merit the highest degree of protection. *See Buckley*, 424 U.S. at 48, 96 S.Ct. 612 ("[T]he First Amendment right to 'speak one's mind . . . on all public institutions' includes the right to engage in 'vigorous advocacy' no less than 'abstract discussion.' Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.") (quotations omitted) (ellipsis in original). The Court has emphasized that political parties have the First Amendment right to speak on political issues and [**77] explicitly acknowledged that coordinated expenditures "share some of the constitutionally relevant features of independent expenditures." *Colorado I*, 518 U.S. at 624, 116 S.Ct. 2309. Speech that articulates a set of political views and explains the speaker's support of a candidate in terms of that candidate's endorsement of those views-*i.e.*, speech that conveys the underlying basis of support-is speech that implicates the strongest and most compelling First Amendment interests.

In any case dealing with campaign finance law it is easy to mystify oneself-and one's audience-with talk of "coordination," "circumvention," "functional equivalent," and the like. These bland phrases mask the import of the absolutist position the majority has taken today. The standard I have proposed makes distinctions and is consistent with the Court's often difficult

precedents in this area, but it proceeds from a fairly simple impulse: If the First Amendment means anything, it means that political speech is not the same thing as paying a candidate's bills for travel, or salaries, or for hamburgers and balloons. In this case, a group of citizens has banded together to express their views on important public matters. Congress has abridged their freedom to do so. This the Constitution does not permit. I respectfully dissent.

[***Editor's Note:*** *Page numbers from the reported citation, 688 F.Supp.2d 498 [*], and the unreported opinion [**] are indicated.*]

[Doc. 89, filed January 27, 2010]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

In re: ANH CAO, et al., Plaintiffs,	)	
	)	Civil Action No. 08-4887
v.	)	
FEDERAL ELECTION COMMISSION, Defendant.	)	

ORDER AND REASONS

This action under 2 U.S.C. § 437h challenges the constitutionality of provisions of [*501] the Federal Election Campaign Act ("FECA" or "the Act") of 1971, 2 U.S.C. § 431 *et seq*, as amended by the Bipartisan Campaign Reform Act ("BCRA") of 2002. Section 437h of the Act assigns to the *en banc* court of appeals the role of decision maker on constitutional challenges. The district court's task is to determine whether the constitutional challenge is "frivolous." If the issues are

not frivolous, the district court is to make findings of fact and certify the issues to be resolved to the appellate court. *Khachaturian v. Federal Election Commission,* 980 F.2d 330, 332 (5th Cir.1992).

Plaintiffs Anh "Joseph" Cao ("Cao"), the Republican National Committee ("RNC"), and the Louisiana GOP ("LA-GOP") (hereinafter referred to collectively as "the Cao plaintiffs") bring the instant eight challenges to several provisions of the Act, contending, *inter alia* that the Supreme Court has left unresolved questions regarding the constitutionality of contribution and expenditures limits on political parties. (Rec. Doc. 19).

2 U.S.C. § 437h provides:

> The Commission, the national committee of any political party, or any individual [**2] eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

The Fifth Circuit has expressly spoken on this particular statute and has required specific findings by the district court prior to certification. In *Khachaturian v. Federal Election Commission,* the Fifth Circuit remanded a case with certified questions because the district court had failed to develop an adequate factual record. 980 F.2d 330 (5th Cir.1992). The Fifth Circuit requires that the district court first determine whether or not the claim is frivolous, and recommends an

evidentiary hearing to conduct the inquiry. Second, a district court should a) identify the constitutional issues in the complaint; b) take necessary evidence; c) make findings of fact; d) certify constitutional questions arising from the above. *Id.* at 332 (quoting *Buckley v. Valeo,* 519 F.2d 817, 818 (D.C.Cir.1975)).

I. Standard of Review

The most thorough discussion of a district court's obligation to assess the contours of the plaintiff's claim before certifying under this statute was set forth by the Ninth Circuit in *Goland v. United States,* 903 F.2d 1247, 1257-58 (9th Cir.1990). There, a district court refused to certify questions to the Ninth Circuit on the grounds that the constitutional challenges were frivolous, and the circuit court affirmed. *Id.* The court approved a "frivolousness" standard "similar to that of a single judge presented with a motion to convene a three judge court to hear constitutional challenges." *Id.*

> Under that standard, a single judge could dismiss constitutional claims which already had [**3] been decided. We believe this is a more appropriate standard. Such a standard may more closely resemble that applied under Rule 12(b)(6) to the failure to state a claim than it does to the frivolousness standard under § 1915(d) . . . Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law it is clear that no relief could be granted under any set of facts that could be proved [*502] consistent with the allegations, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or a close but ultimately unavailing one.

Id. at 1258 (citations omitted). The court also noted that "once a statute has been thoroughly reviewed by the [Supreme] Court, questions arising under 'blessed' provisions understandably should meet a higher threshold." *Id.* at 1257.

The Cao plaintiffs argue repeatedly that the FEC has inappropriately argued the merits. (Rec. Doc. 76 at 6). Because the Court adopts a standard of review akin to that used in deciding a Rule 12(b)(6) motion, some "merits" review is appropriate; the Court could not effectively assess the "frivolousness" of the claims in the motion to certify without undertaking a thorough review of the controlling law.

What is less certain is the proper role of the Court with respect to reviewing the facts. The *Khachaturian* court remanded because the district court failed to determine whether the plaintiff in that as applied challenge had "demonstrate[d] that the $1,000 limit [on campaign contributions] had a serious adverse effect on the initiation and scope of his candidacy." 980 F.2d at 331. The Fifth Circuit then laid out the steps the court should have taken, which have already been cited above. *Id.* In conclusion, the court advised that

> [T]he district court should first determine whether Khachaturian's claim is frivolous in light of *Buckley*. The district court may find it desirable to conduct an evidentiary hearing to assist it in this inquiry. Should the court find that the case is not frivolous, it should proceed to follow the four-step course of action outlined above. If no colorable constitutional claims are presented on the facts as found by the district court, it should dismiss the complaint. If it concludes that colorable constitutional issues

> *are raised from the facts*, it should certify those questions to us.

[**4] *Khachaturian*, 980 F.2d at 331 (emphasis added). This quote strongly supports a conclusion that a district court can engage in some amount of factual review. Further, the "four step course of action" indicates that this Court should only certify constitutional questions that *arise from* a combination of the constitutional issues in the complaint and the Court's findings of fact. *Id.* There is little guidance beyond this in the caselaw to determine the appropriate standard of review to apply to those facts. Nonetheless, despite the *Goland* court's conclusion that the proper standard is the 12(b)(6) standard, where "no relief could be granted under any set of facts," 903 F.2d at 1257, such a standard makes little sense in an as applied challenge, where some review of the facts is inherently necessary to determine if a colorable claim has been raised. The Court will therefore proceed using a deferential standard, akin to the 12(b)(6) standard, but per the instructions in *Khachaturian* will only certify those questions that arise out of the Court's review of both the facts and the law.[1] In this case, both parties have submitted extensive findings of fact, and declined the opportunity to have an evidentiary hearing, preferring to proceed with the record before the Court and the briefs.

Further, the FEC has filed a motion for summary judgment. (Rec. Doc. 69). In a motion for summary judgment, the Court goes beyond the pleadings to

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[1] As will be made clear below, the Court's review of the facts only comes to bear on a limited number of the plaintiffs' challenges. To the extent the Court finds the plaintiffs' challenges foreclosed as a matter of law, it is adopting the *Goland* standard of review, without modification.

determine [*503] whether there is any genuine issue as to any material fact such that the movant is entitled to judgment as a matter of law. *See Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, 477 (5th Cir.2002).

Because the Court is adopting a "frivolousness" standard that is somewhere between a [**5] motion to dismiss-where no factual review is appropriate-and a motion for summary judgment-where the Court must review for genuine issues of material fact-it follows that any question that the Court finds "frivolous" is also appropriate for summary judgment.

Finally, the *Khachaturian* court's instructions suggested that the "frivolousness" determination was the first step of the district court's review process, followed by a second step, involving the four step process from *Buckley*. 980 F.2d 330. Both steps, however, involve a review of the evidence, followed by a determination of whether colorable constitutional claims have been presented. *Id.* The Court has taken evidence, and its findings of facts are set forth below. However, rather than engage in the analysis of those facts twice, after identifying the constitutional issues, the Court will first set forth its findings, and then certify any colorable constitutional questions that arise out of the facts and complaint as non-frivolous.

II. Questions Presented for Certification to the *En Banc* Panel of the Fifth Circuit

The Cao plaintiffs ask the Court to certify eight questions:

> 1. Has each of the plaintiffs alleged sufficient injury to constitutional rights enumerated in the following questions to create a constitutional "case or controversy" within the judicial power

of Article III?

2. Do the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(2)-(3) violate the First and Fifth Amendment rights of one or more plaintiffs in that they are excessively vague, overbroad, and beyond the authority of Congress to regulate elections as applied to coordinated expenditures other than (a) communications containing express advocacy, (b) targeted federal election activity, (c) disbursements equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature?

3. Do the expenditure limits at 2 U.S.C. § 441a(d)(2)-(3) violate the First Amendment rights of one or more plaintiffs as applied to coordinated expenditures for (a) communications containing express advocacy and (b) targeted federal election activity?

4. Do the limits on coordinated expenditures 2 U.S.C. § 441a(d)(3) violate the First [**6] Amendment rights of one or more plaintiffs?

(a) Do all but the highest limits violate such rights because any lower rates are unsupported by the necessary anti-corruption interest?

(b) Is 2 U.S.C. § 441a(d)(3) facially unconstitutional because lower rates cannot be severed from higher rates and the voting-age-population formula is substantially overbroad and inherently unconstitutional?

(c) Is the highest limit for expenditures coordinated with Representatives uncon-

stitutionally low?

5. Do the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and the Coordinated Contribution Provision at 2 U.S.C. § 441a(a)(7)(B)(i) (treating coordinated expenditures as in-kind "contributions") violate the First and Fifth Amendment rights of one of more plaintiffs in that they are excessively vague, overbroad, and beyond the authority of Congress to regulate elections as applied to coordinated [*504] expenditures other than (a) communications containing express advocacy, (b) targeted federal election activity, (c) disbursements equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature?

6. Do the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and Coordinated Contribution Provision at 2 U.S.C. § 441a(a)(7)(B)(i) (treating coordinated expenditures as "contributions") violate the First Amendment rights of one or more plaintiffs as applied to coordinated expenditures for (a) communications containing express advocacy and (b) targeted federal election activity?

7. Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) violate the First Amendment rights of one or more plaintiffs as applied to a political party's in-kind and direct contributions because it imposed the same limits on parties as on political action committees ("PACs")?

8. Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) facially violate the First Amendment rights of one or more plaintiffs?

(Rec. Doc. 19).

III. FACTUAL FINDINGS

RULINGS ON EVIDENTIARY OBJECTIONS

As a preliminary matter, the Court notes its limited role as factfinder in this matter for [**7] any questions that are not "frivolous." The Court has opted to adopt the reasoned approach followed by Judge Vanaskie in *Mariani v. United States,* 80 F.Supp.2d 352, 362 (M.D. Pa.1999), and will provide the circuit court extensive findings, describing in detail the relationship between political parties, candidates, and donors under the current regulatory system. The Court further notes that in the absence of a jury, it is inclined to be overinclusive rather than underinclusive when presented with close evidentiary disputes, preferring to convey as detailed a record as possible to the reviewing court. *See* CHARLES WRIGHT AND ARTHUR MILLER, 9A FED. PRAC. & PROC. CIV. § 2411 (3d ed.) ("in a nonjury case the court should be slow to exclude evidence challenged under one of the exclusionary rules").

In their responses to each other's proposed findings of facts, each side raised numerous objections the other side's claims. However, the FEC's responses centered on the proper interpretation of the evidence, not on its admissibility. The Cao plaintiffs raised numerous substantive arguments about the facts, and also raised repeated evidentiary objections, which are addressed below. The Court's resolution of disputes about the proper interpretation of the facts will be evident in its findings. Some proposed findings were legal conclusions or otherwise insufficiently supported by the record, and have been omitted.

A. *Relevance, Materiality, and Vagueness*

The Cao plaintiffs assert that many of the FEC's

proposed findings are irrelevant to the instant litigation because they: (1) address campaign contributions, whereas the parties here contest the constitutionality of limits on expenditures;[2] 2) provide historical narrative and not [**8] factual evidence;[3] (3) relate to entities not a party to the case;[4] or (4) do not directly address [*505] the claims at issue.[5] They also argue that some of the FEC's quantitative characterizations are misleading without the proper economic context.[6]

The Court has taken all of the above objections into consideration in reaching its Findings of Fact. To the extent proposed facts that are tangential to the instant litigation nonetheless provide useful context for overall campaign finance regulation scheme, the above objections have been overruled. However, to the extent those proposed facts obscure the most relevant issues being put before the appellate court, those objections have been sustained.

B. *Professor Krasno's Testimony*

Jonathan Krasno is an Associate Professor at Binghamton University who has authored an expert report in this litigation. (Jonathan Krasno, Political

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[2] This objection was raised as to FEC proposed findings 9-14, and 98.

[3] This objection was raised as to FEC proposed findings 21-25.

[4] This objection was raised as to FEC proposed findings 8, 9, 11-14, 34, 35, 38-44, 48, 49, 72-77, 90, 92, 107, and 141.

[5] This objection was raised as to FEC proposed findings 15-20, 72-78, 89, 93, 100, 112, 145.

[6] This objection was raised as to FEC proposed findings 31-44, 89, and 149.

Party Committees and Coordinated Expenditures in *Cao v. FEC* (Krasno Rept.), FEC Exh. 1). Professor Krasno has published numerous works in the field of political science, many of which involve the role of campaign finance regulation and political parties in United States politics.

The Cao plaintiffs object to Professor Krasno's expert testimony "in so far as he is testifying as to facts and not expressing an opinion as to facts already properly in the record."[7] [**9] (Rec. Doc. 76-2 at 2). Some of the proposed findings based on Professor Krasno's testimony are assertions about historical trends and political motivations, and lack additional supporting evidence in the record. *See, e.g.*, FEC Proposed Finding 28 ("The goal of the RNC [in its inception] was 'survival' and to 'provide[ ] a vehicle for continuity'"). Experts are, however, permitted to testify as to their opinions regarding facts not in the record. FRE 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing."). The Court will treat these statements as Krasno's opinion, and weigh them accordingly.[8] Some of Krasno's statements, however, are clearly facts. The Court considers many of these to be legislative facts, of which it can take judicial notice. *See* 12 Fed. Proc., L.Ed. § 33:59 ("It has been said generally that 'adjudicative facts' relate specifically to

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[7] This objection was raised as to FEC proposed findings 5, 6, 26-31, 66, 68, 69, 78, 79, 81, 92, 99, 100, 103, 117, 119, 126, 130, 131, 138, 141, 145, and 150-52. (Rec. Doc. 76-2).

[8] The Cao plaintiffs opted not to depose Krasno or submit an expert report of their own.

the activities or characteristics of the litigants, as opposed to 'legislative facts,' which are those a court relies upon when it purports to develop a particular law or policy and thus considers material wholly unrelated to the activities of the parties.") Further, the Cao plaintiffs do not object to the content of many of these facts, criticizing only their means of introduction. To the extent Cao's objections raise doubts as to the accuracy of such statements, the Court has not adopted those statements as its findings without additional supporting evidence in the record.

C. *The Biersack, Meehan, and Rozen Declarations*

The Cao plaintiffs argue that the FEC improperly attached these declarations as exhibits to their supplemental briefing on August 31, 2009, even though the discovery cut-off was July 30, 2009. (Rec. Doc. 78-2 [*506] at 1). They assert that they are prejudiced by the late filings because [**10] they were not afforded an opportunity to depose the declarants or respond to their claims. (Rec. Doc. 78-2 at 2). They also argue that the facts presented by the declarants are adjudicative facts, not legislative facts, and therefore the FEC cannot avoid the above mentioned discovery deadline. (Rec. Doc. 85 at 1-2).

The FEC argues that the declarations are not "discovery" as defined by the Federal Rules of Civil Procedure, and are therefore not subject to the discovery deadlines, and dispute the Cao plaintiffs' characterization of the declaration as containing adjudicative facts. (Rec. Doc. 82 at 2, 4). They also point out that the Cao plaintiffs propounded no discovery requests, so the FEC cannot be said to have withheld requested information. (Rec. Doc. 82).

Legislative facts are typically characterized as

"general facts" that "apply universally" and "do not relate specifically to the activities or characteristics of the litigants." *See* 12 Fed. Proc., L.Ed. § 33:59. At issue are a statement by former congressman Martin Meehan (Rec. Doc. 66-4); a statement by Robert Biersack, Special Assistant to the Staff Director for Data Integration at the FEC in which he compiles and describes[9] publicly available data on campaign expenditures and contributions (Rec. Doc. 66-5); and a statement by lobbyist and fundraiser Robert Rozen (Rec. Doc. 66-34). The Court acknowledges that information in these declarations occupies a gray area in between legislative and adjudicative facts: the statements purport to represent activities of candidates and political parties in general, and not those of the litigants in [**11] the instant case.[10] *See id.* However, they are certainly disputable and might not "apply universally." *Id.*

At oral argument on the motion to strike these declarations, the Court indicated its inclination to convey as complete a record as possible to the circuit court, but gave the Cao plaintiffs the opportunity to

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[9] Although the Cao plaintiffs characterize Biersack's declaration as charts plus "commentary," (Rec. Doc. 85 at 4) the words accompanying the data are purely descriptive, and provide no discernable "slant." (Rec. Doc. 66-5).

[10] If this were a facial challenge to the campaign finance statute, there would be a stronger argument that the Meehan declaration, at least, which describes the activity of political parties and candidates, clearly "relates to" the activities of the litigants. However, as most of the questions presented are as applied challenges and neither Meehan nor the Democratic National Committee are parties, the declaration's designation is more ambiguous.

depose the objected to declarants or submit counter-declarations. They declined this offer, resting on their objection that the statements in the reports were adjudicative rather than legislative facts and improperly before the Court. The Court therefore holds that admitting these declarations to the record will cause no undue prejudice to the Cao plaintiffs. The Court DENIES the Cao plaintiffs' motion to strike these exhibits.

FINDINGS OF FACT

A. Background

The Litigation

1. The Cao plaintiffs filed their complaint on November 13, 2008, challenging several provisions of the FECA/BCRA in what the complaint dubbed a successor case to *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (*Colorado I*) and *FEC v. Colorado Republican Federal Campaign Committee,* [*507] 533 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) ("*Colorado II*"). (Rec. Doc. 1 at 1). They filed a Motion for Certificate of Appealability on December 23, 2008 (Rec. Doc. 19). After oral argument on the motion, the Court ordered an [**12] evidentiary hearing to comply with the Fifth Circuit's requirement in *Khachaturian.* (Rec. Doc. 42).

2. After the close of discovery, the parties jointly moved to convert the scheduled evidentiary hearing to a second argument on the merits of the Motion for Certificate of Appealability and the FEC's cross motion for summary judgment. (Rec. Docs. 69, 72). That argument was heard on November 9, 2009, and taken under submission.

The Parties

3. Anh "Joseph" Cao is the United States Representative for the Second Congressional District of Louisiana. (Deposition of Anh "Joseph" Cao (Cao Dep.) at 8, FEC Exh. 4). Cao, a Republican, defeated incumbent Democrat William Jefferson in a general election on December 6, 2008. (Second Amended Verified Complaint for Declaratory and Injunctive Relief ("AVC") ¶ 10 (Rec. Doc. 35)). The election was held in December because primaries had been postponed due to damage from Hurricane Gustav. (Official 2008 Election Results at 113 n.*, http://www.fec.gov/pubrec/fe2008/2008congresults.pdf). (Rec. Doc. 88, Joint Stipulation ("J. Stip.") of the parties at 1-2).

4. This litigation began prior to Cao's election. In his Complaint, Cao indicated that he wanted to participate with RNC and LA-GOP to the maximum extent constitutionally permissible in the activities outlined in the Complaint. (AVC ¶ 10; Deposition of Anh "Joseph" Cao (Cao Dep.) at 13-15, Defendant Federal Election Commission's Proposed Findings of Fact and Statement of [**13] Material Facts as to Which There is No Genuine Dispute (FEC Facts) Exh. 4 (Rec. Doc. 66)). (J. Stip. at 1-2).

5. Cao is "eligible to vote in any election for the office of President," 2 U.S.C. § 437h. (AVC ¶ 10). (J. Stip. at 1). He therefore has standing to bring the instant motion to certify under the requirements of 2 U.S.C. § 437h. ("The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitu-

tionality of any provision of this Act.").

6. RNC is the national political party committee of the Republican Party. Its headquarters are in Washington, District of Columbia. (AVC ¶ 11). It is an unincorporated association made up of 168 members representing all of the states and territories of the United States. (Federal Rule of Civil Procedure 30(b)(6) Deposition of Republican National Committee witness Thomas J. Josefiak (Josefiak Dep.) at 12, FEC Facts Exh. 5). (J. Stip. at 2).

7. As a national party, RNC has historically participated, and participates today, in electoral and political activities at the federal, state, and local levels. (AVC ¶ 35). (J. Stip. at 2). RNC supports both federal, state, and local candidates. RNC also seeks to advance its core principles–a smaller federal government, lower taxes at all levels of government, individual freedom, and strong national defense–by promoting an issue agenda advocating Republican [**14] positions, electing Republican candidates, and encouraging governance in accord with these Republican views. (AVC ¶ 35).

[*508] 8. RNC's core principles are more fully set out in its party platform, the *2008 Republican Platform*, available at http://www.gop.com/2008Platform/. (AVC ¶ 36). (J. Stip. at 3).

9. LA-GOP is the State committee of the Republican Party for Louisiana. LA-GOP maintains offices in, among other places, New Orleans and Metairie, Louisiana, which offices are staffed by paid employees. (AVC ¶ 12). LA-GOP is governed by the executive committee, consisting of individuals serving on a voluntary basis. (Fed.R.Civ.P. 30(b)(6) Deposition of Republican Party of Louisiana witness Charles Lee

Buckels (Buckels Dep.) at 13-14, FEC Facts Exh. 6). (J. Stip. at 3).

10. As a state party, LA-GOP has historically participated, and participates today, in electoral political activities at the state and local levels. (AVC ¶ 38). (J. Stip. at 3). LA-GOP supports both federal and state candidates. LA-GOP also seeks to advance its core principles–a smaller federal government, lower taxes at all levels of government, individual freedom, and strong national defense–by electing Republican candidates, and encouraging governance in accord with their Republican views. (AVC ¶ 38). The purpose of the LA-GOP is to promote the Republican message throughout the state and elect Republican candidates. (Buckels Dep. 18:1-19:1).

11. The defendant Federal Election Commission ("Commission" or "FEC") is the independent [**15] agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-55, and other statutes. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(I); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act", 2 U.S.C. §§ 437d(a)(8), 438(a)(8), 438(d); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. §§ 437d(a)(7), 437f. The Commission has exclusive jurisdiction with respect to civil enforcement of the Act. 2 U.S.C. § 437c(b)(I). (J. Stip. at 4). The Commission's sole office is located in Washington, DC. (AVC ¶ 13).

B. The Treatment of Political Parties under the BCRA/FECA

12. The national party committees for the Republican Party are the RNC, the National Republican Congressional Committee (NRCC), and the National Republican Senatorial Committee (NRSC). (Declaration of Robert W. Biersack (Biersack Decl.) at ¶ 2, FEC Exh. 3). The national party committees for the Democratic Party are the Democratic National Committee (DNC), the Democratic Congressional Campaign Committee (DCCC), and the Democratic Senatorial Campaign Committee (DSCC). (*Id.*)

13. Jonathan Krasno is an Associate Professor at Binghamton University who has authored an expert report in this litigation. (Jonathan Krasno, *Political Party Committees and Coordinated Expenditures in Cao v. FEC* (Krasno Rept.), FEC Exh. 1). Professor Krasno has published numerous works in the field of political science, many of which involve the role of campaign [**16] finance regulation and political parties in United States politics. (*Id.* at *Curriculum Vitae 1-4*). Professor Krasno also co-wrote an expert report that was explicitly relied upon by the Supreme Court in *FEC v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431, 470, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) (*Colorado II*) (citing Frank J. Sorauf & Jonathan S. Krasno, *Political Parties and Coordinated* [*509] *Spending* (Sorauf & Krasno *Colorado II* Rept.), FEC Exh. 33).

14. According to Professor Krasno, political parties "have been strongly advantaged by the system of financing campaigns." (Krasno Rept. at 1, FEC Exh. 1).

15. Political parties are able to raise more money, from more sources, than other entities regulated by the Act,

including candidates and other political committees, such as separate segregated funds of corporations and labor organizations, commonly known as political action committees (PACs). (2 U.S.C. § 441a(a)).

16. Political parties also receive special non-monetary benefits in connection with federal elections. Unlike interest groups, parties have their names next to those of their candidates on ballots in most states. Major-party nominees are automatically included on the general election ballot, and the names or symbols of their parties are printed near their names. States also often run parties' primary elections. (Expert Report of Jonathan S. Krasno and Frank J. Sorauf in *McConnell v. FEC,* Evaluating the Bipartisan Campaign Reform Act (BCRA) (Krasno and Sorauf *McConnell* Report) at 25 [DEV 1-Tab 2], FEC Exh. 39; Rebuttal Expert Report of Donald P. Green in *McConnell v. FEC, The Impact of BCRA on Political Parties: A Reply to* [**17] *LaRaja, Lott, Keller, and Milkis* (D. Green *McConnell* Rebuttal Report) at 7-9 [DEV 5-Tab 1], FEC Exh. 41; Responses and Objections of the Republican National Committee to Defendant Federal Election Commission's First Requests for Admissions in *McConnell v. FEC* (Resps. RNC to FEC's First *McConnell* RFA's), Nos. 2, 4, 6 [DEV 12-Tab 10], FEC Exh. 42; Plaintiff Republican National Committee's Responses and Objections to Defendant Federal Election Commission's Second Set of Discovery Requests in *RNC v. FEC,* 98-cv-1207 (D.D.C.) (RNC Resps. to FEC RFA's in *RNC*), Nos. 26, 34, 35 [DEV 68-Tab 35], FEC Exh. 59). "DEV" and "Tab" citations refer to Defendants' Exhibit Volumes from *McConnell v. FEC,* Civ. No 02-582 (D.D.C.). These documents, which include evidence from the *McConnell* case and other cases, are

part of the record in this litigation pursuant to a Stipulation and Protective Order entered into by the parties and approved by the Magistrate Judge. (Rec. Doc. 49).

17. Unlike political parties, "[o]ther entities are not entitled to organize the slate of candidates presented to voters. Other entities do not organize legislative caucuses, assign committee chairs and members, or elect legislative leadership. . . . Even the largest political action committees cannot begin to approach the political scope, influence, or depth of electoral support characteristic of the Republican or Democratic Parties." (Expert Report of Donald P. Green in *McConnell v. FEC,* Report on the Bipartisan Campaign Reform Act (D. Green *McConnell* Report) at 8 [DEV 1-Tab 3], FEC Exh. 40).

C. Relevant Provisions of the BRCA/FECA and their Effects on Parties

Contributions to Candidates

[**18] 18. Under the Act, individuals, political parties, and other political committees are all limited in the amounts that they can contribute to one candidate in a given election cycle. 2 U.S.C. § 441 a(a)(1). (J. Stip. at 5).

19. Under the current limits, a federal candidate is limited to $2,400 in contributions from each individual per election ($2,400 in a primary election and an additional $2,400 in the general election). 2 U.S.C. § 441a(a)(1)(A); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure [*510] Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009). (J. Stip. at 5).

20. National, state, local and district parties are con-

sidered multicandidate political committees under the Act, and therefore each is limited to $10,000 in contributions to one candidate in a given election cycle ($5,000 in the primary and $5,000 in the general election). 2 U.S.C. §§ 441a(a)(2)(A); 2 U.S.C. §§ 431(4), 431(16), 441a(a)(4). National parties and their Senatorial campaign committees may together contribute up to $42,600 to each Senate candidate in the 2010 election cycle. 2 U.S.C. § 441a(h); 11 C.F.R. §§ 110.2(e)(1), 110.3(b)(2); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009). (J. Stip. at 5).

21. Candidates can receive contributions from each of the major parties' three national committees, as well as state and local committees (including state committees outside the state in which the candidate is running). For example, in the 2008 election cycle, one U.S. Senate [**19] candidate received $51,563 in party contributions, and one U.S. House candidate received $98,051, due to the variety of national, state, and local party committees permitted to contribute $5,000 under 2 U.S.C. § 441a(a)(2)(A). In 2008, other Senate candidates reported receiving party contributions of $46,897, $46,802, and $42,900. Other 2008 U.S. House candidates reported receiving $57,250, $38,979, and $24,640 in party contributions. (Biersack Decl. ¶ 17, Tables 24-25, FEC Exh. 3).

22. The Act's contribution limits apply both to direct contributions of money and in-kind contributions of goods or services. 2 U.S.C. § 431(8)(A). Expenditures made in coordination with a candidate or her campaign are considered in-kind contributions to the candidate. 2 U.S.C. § 441a(a)(7)(B).

Contributions to Parties

23. Under the Act, the committees established by each national party can together receive up to $30,400 per year from each individual donor in federal contributions (money raised in accord with the restrictions of the Act, also known as "hard money"). In each state, the state, district and local committees of a party can receive up to a combined $10,000 per year from each individual donor. By contrast, other political committees can receive only $5,000 per year from an individual donor in hard money. 2 U.S.C. § 441a(a)(1); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009).

[**20] 24. Under the Act, the committees established by each national party can together receive up to $15,000 per year from other multicandidate political committees. Multicandidate political committees can themselves receive only $5,000 per year from individuals or other multicandidate political committees. 2 U.S.C. §§ 441a(a)(1)(C), 441a(a)(2); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009).

25. State, district and local committees of a party can also receive what are known as "Levin Funds." 2 U.S.C. 441i(b); 11 C.F.R. §§ 300.30-32. These are donations of up to $10,000 per year per donor, and they may come from sources ordinarily impermissible under the Act, such as corporations or labor unions. 11 C.F.R. § 300.31(c). These funds can be used in conjunction with hard money for certain activities that benefit federal candidates, such as generic party voter registration drives, voter identification programs, and

[*511] get-out-the-vote efforts. 11 C.F.R. § 300.32. No other entity is permitted to receive Levin Funds under FECA. 11 C.F.R. §§ 300.10; 300.32.

26. A national party committee can receive unlimited amounts as transfers from other national party committees (*e.g.*, the RNC can transfer unlimited amounts to the NRCC and vice versa). 2 U.S.C. § 441a(a)(4). A National Party committee can also receive unlimited amounts of hard money as transfers from state, district, and local party committees, and vice versa. 2 U.S.C. § 441a(a)(4). State, district, and local party committees can transfer hard money to one another without limit under the Act. 2 U.S.C. § 441a(a)(4). And candidate campaigns can transfer funds [**21] to national, state, or local committees of political parties "without limitation." 2 U.S.C. § 439a(a)(4). This ability to freely transfer money between, among, and to political committees is available only to party committees and committees affiliated with the same corporation, union or other entity. 2 U.S.C. §§ 441a(a)(1); 441a(a)(2); 441a(a)(5).

27. In 2007 and 2008, the Republican national party committees (RNC, NRSC, and NRCC) transferred a total of $46,176,897 to Republican state committees. In 2007 and 2008, the Democratic national party committees (DNC, DSCC, and DCCC) transferred a total of $116,020,742 to Democratic state committees. (Biersack Decl. ¶ 18, Table 26, FEC Exh. 3).

28. National party committees also receive funding from the federal government for their presidential nominating conventions. 26 U.S.C. § 9008(b). For the 2008 conventions, the convention committees for the Democratic and Republican parties each received payments of $16,356,000 from the United States

Treasury. (Both Major Parties to Receive Public Funding for 2008 Convention, http://www.fec.gov/press/press2007/20070626conventions.shtml, FEC Exh. 17).

Party Expenditures

29. Expenditures made by parties that are not coordinated with a candidate are considered independent and parties may generally engage in them without limit. *Colorado II,* 533 U.S. at 465, 121 S.Ct. 2351; *Colorado I,* 518 U.S. at 618, 116 S.Ct. 2309. Party independent expenditures are limited only where the national committee of a political party has been designated as the authorized committee of a [**22] Presidential candidate and the campaign is subject to public financing restrictions. 11 C.F.R. §§ 109.36, 9002.1.

30. Party coordinated communications are one category of coordinated expenditures that are limited under the Act. 11 C.F.R. § 109.37.

31. Generally, coordinated expenditures are those that are made in "cooperation, consultation or concert with, or at the request or suggestion of" the candidate or candidate's authorized committee. 11 C.F.R. §§ 109.20, 109.37; *see also* 2 U.S.C. § 431(17).

32. Party coordinated communications are, by definition, "paid for by a political party committee or its agent." 11 C.F.R. § 109.37(a)(1). (J. Stip. at 6).

33. However, under FEC regulations, not every communication is considered a coordinated communication even if it is made in "cooperation, consultation or concert with, or at the request or suggestion of" the candidate or candidate's authorized committee. Whether a particular communication is considered to be a party coordinated communication is based upon both

the conduct of those involved and the content of the communication. 11 C.F.R. § 109.37. The conduct standard is met if, *e.g.*, "[t]he communication is created, produced,[*512] or distributed at the request or suggestion of a candidate," "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication . . . and the candidate who is clearly identified in the communication," or [**23] the person paying for the communication hires a candidate's vendor or former employee "to create, produce, or distribute" it and in doing so that vendor/employee uses "material" information about "campaign plans, projects, activities, or needs" or shares such information with the payer. (11 C.F.R. §§ 109.21(d)(1)(i)); 109.21(d)(3); 109.21(d)(4)-(5).

34. In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub.L. No. 107-155, which included a provision prohibiting the national parties from receiving or spending any "soft money"—money that was not subject to the limitation or prohibitions of FECA. 2 U.S.C. § 441i(a). (J. Stip. at 7).

35. Prior to the passage of BCRA, the RNC made only limited independent expenditures as compared to the substantial independent expenditures that it has made since the passage of BCRA. (Josefiak Dep. at 70-72, FEC Facts Exh. 5 (recalling only one instance of pre-BCRA independent expenditures)). (J. Stip. at 7).

36. In general, the Act currently allows a national and state committee of a political party each to coordinate spending with a candidate up to $43,700 or $87,300 in races for the House of Representatives, and up to a range of $87,300 to $2,392,400 in races for Senate, and the Act also permitted the national parties to coordi-

nate up to $19,151,200 in the most recent Presidential race. 2 U.S.C. §§ 441a(d)(2)-(3); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009); Price Index Increases for Expenditure Limitations, 73 Fed. Reg. 8698 (Feb. 14, 2008). These [**24] coordinated expenditures under the Act are in addition to the $5,000 in contributions that all multicandidate political committees can make pursuant to 2 U.S.C. § 441a(a)(2)(A). Each candidate may receive coordinated expenditures up to this limit from a national committee, and also coordinated expenditures up to this limit from the relevant state party committee. 11 C.F.R. § 109.33(b). Thus, each candidate may receive party coordinated expenditures of up to $174,600.

37. For most candidates for the U.S. House of Representatives, the Act currently allows a national or state committee of a political party to make coordinated expenditures of up to $43,700, in addition to the contributions the party committees may make under 2 U.S.C. § 441a(a)(2)(A). 2 U.S.C. § 441a(d)(3); 11 C.F.R. § 109.33; Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009). (J. Stip. at 6). Each candidate may receive coordinated expenditures up to this limit from a national committee, and also receive coordinated expenditures up to this limit from the relevant state party committee. 11 C.F.R. § 109.33(b). Thus, each such candidate may receive party coordinated expenditures of up to $87,400.

38. If a candidate for the U.S. House of Representatives is running from a state with only one Congres-

sional district, a national or state committee of a political party can make coordinated expenditures of up to $87,300, in addition to the contributions the party committees may make under 2 U.S.C. § 441a(a)(2)(A). 2 U.S.C. § 441a(d)(3); 11 C.F.R. § 109.33; Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling [*513] Disclosure [**25] Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009). (J. Stip. at 6). Each candidate may receive coordinated expenditures up to this limit from a national committee, and also coordinated expenditures up to this limit from the relevant state party committee. (11 C.F.R. § 109.33(b)). Thus, each candidate may receive party coordinated expenditures of up to $174,600.

39. For U.S. Senate campaigns, the Act currently allows national or state committees of political parties to make coordinated expenditures in amounts ranging from $87,300 to $2,392,400, depending upon the voting age population of the state, in addition to the contributions the party committees may make under 2 U.S.C. § 441a(a)(2)(A). 2 U.S.C. § 441a(d)(3); 11 C.F.R. § 109.33; Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009). (J. Stip. at 6). Each candidate may receive coordinated expenditures up to this limit from a national committee, and also receive coordinated expenditures up to this limit from the relevant state party committee. (11 C.F.R. § 109.32(b)). Thus, Senate candidates may receive party coordinated expenditures in amounts ranging from $174,600 to $4,784,800.

40. National committees and state committees of political parties can assign their authority to make

coordinated party expenditures to other political party committees under 2 U.S.C. § 441a(d)(3). 11 C.F.R. § 109.33(a). (*See also* Nov. 12, 2008 Letter from Roger Villere, Jr., Chairman of LAGOP to Mike Duncan, Chairman of RNC (LA-GOP0001), FEC Facts Exh. 13 (authorizing RNC to make LA-GOP's coordinated expenditures in 2008 Cao campaign); RNC Spreadsheet for 2008 Cao Campaign (RNC 0000001), FEC Facts Exh. 14 (indicating that [**26] coordinated expenditure limit for 2008 Cao campaign increased from $42,100 to $84,200 following receipt of authorization from LA-GOP)). (J. Stip. at 6-7). This allows a candidate to receive the maximum coordinated expenditures that the state and national parties are permitted to make even though "the state parties do not have sufficient federal resources in a lot of the smaller states to be able to fully fund a coordinated expenditure program." (Federal Rule of Civil Procedure 30(b)(6) Deposition of Republican National Committee witness Thomas J. Josefiak (RNC 30(b)(6) Dep.) at 63, FEC Exh. 5).

41. Due to the restrictions on coordinated expenditures, LA-GOP typically assigns its coordinated expenditure amounts to the RNC in order to increase the efficiency and effectiveness of the limited funds. (Buckels Dep. at 35-36, FEC Exh. 6). (J. Stip. at 7).

42. The party coordinated expenditure provisions are adjusted for inflation each year. 2 U.S.C. § 441a(c)(1)(B). (J. Stip. at 6).

43. Political parties are permitted to make coordinated expenditures with their federal candidates in excess of the contribution limits that apply to all multicandidate political committees. 2 U.S.C. §§ 441a(d)(2)-(3). Neither other political committees nor individuals can engage

in such coordinated expenditures in excess of their contribution limits.

44. Prior to 90 days before a Congressional or Senate election, or 120 days before a Presidential election, a party communication is not deemed coordinated with a candidate unless it [**27] "disseminates, distributes, or republishes . . . campaign materials prepared by a candidate, . . ." or "expressly advocates the election or defeat of a clearly identified candidate." 11 C.F.R. §§ 109.37(a)(2)(i)-(ii). No other party communications made prior to the [*514] 90/120 day windows count against the Act's limits on party contributions or party coordinated expenditures.

45. Even within the 90 or 120 days immediately before an election, a party communication is not considered a party coordinated communication subject to the Act's limits unless it refers to a clearly identified federal candidate and is disseminated within that candidate's jurisdiction. 11 C.F.R. § 109.37(a)(3).

46. A party communication also is not considered coordinated unless the party and candidate have engaged in specific conduct indicating coordination, even if the communication is disseminated within 90 or 120 days before an election and refers to a clearly identified federal candidate in the appropriate jurisdiction. 11 C.F.R. §§ 109.37(a)(3), 109.21(d)(1)-(6). The conduct standard is met if, *e.g.*, "[t]he communication is created, produced, or distributed at the request or suggestion of a candidate," "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication . . . and the candidate who is clearly identified in the communication," or the person paying for the commu-

nication hires a candidate's vendor or former employee "to create, produce, or distribute" it and in doing so that vendor/employee uses "material" information about "campaign plans, projects, activities, or needs" or shares such information with the payer. (11 C.F.R. §§ 109.21(d)(1)(i)); 109.21(d)(3); 109.21(d)(4)-(5).

[**28] 47. The Act provides special exemptions to the definitions of contributions and expenditures for parties, which means some party activities are not subject to any contribution limit. Payment of compensation for legal or accounting services by full-time staff on behalf of any political party committee or candidate is excluded from these definitions. 2 U.S.C. §§ 431(8)(B)(viii)(I); 431(9)(B)(vii)(I) & (II). The Act also excludes, for parties and candidates, the use of real or personal property, such as a community room, and the costs of invitations, food, and beverages voluntarily provided by an individual to any political committee, provided that the value of an individual's activity does not exceed $2,000 in any calendar year. 2 U.S.C. § 431(8)(B)(ii). The Act excludes from the definition of contribution for parties and candidates the payment of travel expenses incurred by any individual on behalf of the candidate or party, as long as the cumulative value of the expenses incurred by an individual does not exceed $1,000 for a candidate and $2,000 for a political party for any calendar year. 2 U.S.C. § 431(8)(B)(iv). State and local parties may pay for the costs of some communications, such as slate cards, sample ballots, or other materials distributed by volunteers, without regard to the contribution and expenditure limits, even if those activities are coordinated with candidates. 2 U.S.C. §§ 431(8)(B)(v); 431(9)(B)(iv); *Coordinated and Independent Expenditures,* 68 Fed. Reg. 421, 449 (Jan. 3, 2003). The Act also

excludes, for state and local parties, expenditures for certain campaign materials, as well as certain voter registration and get-out-the-vote activities. 2 U.S.C. §§ 431(9)(B)(viii)-(ix). Certain transfers of payments received by political party committees as a condition of ballot access are also excluded from the definition of "expenditure." 2 U.S.C. § 431(9)(B)(x).

[**29] 48. A party can avoid having a communication deemed a coordinated communication by setting up and distributing a written "firewall" policy that prohibits the flow of information between the individuals "providing services for the [party] paying for the communication" and the individuals [*515] who are "currently or [were] previously providing services to the candidate who is clearly identified in the communication [or his or his opponent's committee]." 11 C.F.R. §§ 109.37(a)(3), § 109.21(h).

49. Because the RNC has a continuous and ongoing relationship with its candidates, special measures must be taken to do independent expenditures regarding its candidates. The RNC has extensive discussions with its candidates about their needs, activities and strategy. As a result, activities by the RNC about its candidates may be deemed to be coordinated with its candidates, subjecting these activities to the FECA's coordinated expenditure and contribution limits. In order to engage in any independent expenditure supporting one of its candidates, the RNC may hire an outside consulting group to do the independent expenditures but neither the RNC nor any of its officers, employees or agents may have any involvement in the independent expenditure in order for it to be truly independent. (Josefiak Dep. 58:6-60:12, 70:13-17, 72:19-73:6, 153:22-155:4, 160:14-161:7). In fact, neither

the chairman of the RNC nor any of the RNC's officers, employees or agents has control over the message of an independent expenditure yet the RNC bears responsibility for that message. The RNC makes its independent expenditures in this way out of a belief that there is no way to have a true "firewall policy." (Josefiak Dep. 159:12-18).

50. Some party committee officials and candidates have expressed dissatisfaction with party [**30] independent expenditures due to their lack of control over the content. (RNC 30(b)(6) Dep. at 72-73, FEC Exh. 5 (describing independent expenditure in Tennessee Senate race that "caused the chairman angst" due to media scrutiny); Cao Dep. at 34-35, FEC Exh. 4 (describing campaign's frustration because NRCC independent expenditure robocalls were "hurting us more than [they] helped us"); Krasno Rept. at 5-6 & n. 4, FEC Exh. 1 (describing NRCC chairman's dismay at an inability to do anything about a misleading NRCC independent expenditure alleging an opponent called a phone sex line while traveling on business)). As a result, the RNC is reluctant to conduct independent expenditures. (Josefiak Dep. 74:16-76:11, 157:9-158:20).

51. Due to the perceived administrative and content advantages of coordinated expenditures, plaintiffs generally prefer to coordinate activities between candidates and parties. (RNC 30(b)(6) Dep. at 57, FEC Exh. 5 ("no chairman feels that independent expenditures is a preferable way to spend money."); LA-GOP 30(b)(6) Dep. at 79, FEC Exh. 6 ("Any coordination with our candidates is something we would like to do more of."); Cao Dep. at 42, FEC Exh. 4 ("I would like for them to do more radio ads, do more mailing of products on my behalf. But before they do it, I would

like to know the contents of those ads. . . .")).

52. So-called "issue advocacy" has been used extensively in connection with federal elections. Prior to 2002, political party communications that did not contain "magic words" such as "Elect John Smith" or "Vote Against Jane Doe" were considered "issue advocacy" and could be financed in part with soft money even if they focused on specific candidates, allowing parties to [**31] use money that was not subject to the Act's source and amount limitations.[11] *McConnell,* 540 U.S. at 126, 124 S.Ct. 619; [*516] (Krasno and Sorauf *McConnell* Report at 50-66 [DEV 1-Tab 2], FEC Exh. 39). These "issue ads" typically avoided using "magic words" by "condemn[ing] Jane Doe's record on a particular issue before exhorting viewers to call Jane Doe and tell her what you think." *McConnell,* 540 U.S. at 127, 124 S.Ct. 619 (internal quotation marks and footnote omitted). In fact, campaigns would rarely use such "magic words" anyway. *McConnell,* 251 F.Supp.2d at 529 (Kollar-Kotelly, J.) ("The uncontroverted testimony of political consultants demonstrates that it is neither common nor effective to use the 'magic words' of express advocacy in campaign advertisements."). "[T]he overwhelming majority of modern campaign advertisements do not use words of express advocacy, whether they are financed by candidates, political parties, or other organizations." *Id.* Thus, although deemed "issue ads" under the law, in practice issue ads and express advocacy for candidates were "functionally identical in important respects."

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[11] The Court will at times throughout these findings include previous findings and holdings of the Supreme Court to provide context for related findings of fact and a description of controlling law.

McConnell, 540 U.S. at 126, 124 S.Ct. 619 ("[b]oth were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words").

53. Thus, prior to BCRA-when national parties were permitted to receive soft money-"genuine issue advocacy on the part of political parties [was] a rare occurrence." *McConnell*, 251 F.Supp.2d at 451 (Kollar-Kotelly, J.). Similarly, the RNC spent only "a minuscule percentage" of its soft money budget on state and local governmental affairs. *Id.* at 463. "What is clear from the evidence [in *McConnell*], however, is that regardless of whether or not it is [**32] done to advocate the party's principles, the Republican Party's primary goal is the election of its candidates who will be advocates for their core principles." *Id.* at 470.

54. The "conclusion that [issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *McConnell*, 540 U.S. at 127, 124 S.Ct. 619 (footnote omitted).

55. BCRA prevented national parties from spending millions of dollars of soft money running candidate-focused "issue ads" in the days before an election, because national parties could now only receive and spend hard money and because BCRA treats coordinated electioneering communications as coordinated communications subject to contribution limits. (2 U.S.C. §§ 441a(a)(7)(C); 441i(a); 11 C.F.R. §§ 109.37(a)(3); 109.21(c)(4) (public communication in the 90-day or 120-day windows is coordinated if it, *inter alia*, "refers to a clearly identified . . . candidate")). Prior to BCRA, independent expenditures, which can contain express advocacy, had "remained limited" because national

parties could use so-called issue advocacy for "unlimited commercials (mostly) criticizing or (less often) praising a congressional candidate in the days before an election." (Krasno Rept. at 10, FEC Exh. 1; *Colorado II,* 533 U.S. at 455, 121 S.Ct. 2351 (independent expenditures may contain express advocacy because "[a] party may spend independently every cent it can raise wherever it thinks its candidate will shine, on every subject and any viewpoint.")). For example, in the 2000 and 2002 election cycles, the national party committees spent less than $2 million per election cycle on independent expenditures while spending "several hundred million dollars on issue advocacy." (Biersack Decl. at ¶ 11, Table 15, [**33] FEC Exh. 3; Krasno Rept. at 10 and n. 14, FEC Exh. 1). But after BCRA limited parties' ability to engage in unlimited coordinated so-called issue advocacy, "the parties turned immediately [*517] back to independent expenditures." (Krasno Rept. at 10 FEC Exh. 1; RNC 30(b)(6) Dep. at 96, FEC Exh. 5 ("Q. Does the RNC usually make independent expenditures to support or oppose Congressional candidates? A. It has been doing so post BCRA.")). Parties began to spend hundreds of millions of dollars per election cycle on independent expenditures. (Biersack Decl. at ¶ 11, Table 15, FEC Exh. 3; Krasno Rept. at 10, FEC Exh. 1 ("Spending on independent expenditures skyrocketed to $73 million in 2004 and $154 million in 2006 on House elections.")).

56. Political parties can currently use independent expenditures for any type of campaign activity, but parties use them overwhelmingly for media advertising, primarily consisting of television advertisements. (Krasno Rept. at 11 & n. 15, FEC Exh. 1). Prior to the passage of BCRA, "[e]stimates from party officials of

the amount of money going to television went as high as 75 percent at the DCCC." (Expert Report of David B. Magleby, Report Concerning Interest Group Election Advocacy and Party Soft Money Activity at 42 [DEV 4-Tab 8], FEC Exh. 55 (footnote omitted)).

D. Recent Fund-Raising, Contribution, and Expenditure Levels for Political Parties

57. From 1992 to 2006, political party spending "increased tenfold." (Krasno Rept. at 20-21, FEC Exh. 1).

[**34] 58. Data shows that the Democratic and Republican parties together raised more than $1.4 billion in the two-year 2004 election cycle, more than $1 billion in the 2006 cycle, and more than $1.5 billion in the 2008 cycle. (Biersack Decl. ¶ 6, Table 5, FEC Exh. 3).

59. In the 2007-2008 election cycle, the national parties raised more money than in the election cycles prior to the effective date of the Bipartisan Campaign Reform Act of 2002, Pub.L. No. 107-155, when they were also able to raise "soft" money-money that was not subject to the limitation or prohibitions of FECA. (Biersack Decl. ¶ 3, Tables 1 & 2, FEC Exh. 3).

60. In the 2008 election cycle, the major national party committees (RNC and DNC) supported their federal candidates with a total of $529,262 in contributions, $31,256,379 in coordinated expenditures, and $54,563,499 in independent expenditures. During this same period, the national Senatorial committees (NRSC and DSCC) supported their federal candidates with a total of $648,095 in contributions, $5,353,546 in coordinated expenditures, and $112,013,708 in independent expenditures. During this same period, the national Congressional committees (NRCC and DCCC) supported their federal candidates with a total of

$680,817 in contributions, $5,074,523 in coordinated expenditures, and $112,612,969 in independent expenditures. During this same period, candidates for the U.S. House of Representatives spent a total of $949,700,00 on their candidacies, and candidates for the U.S. Senate spent a total of $444,700,000 on their candidacies. (Biersack Decl. ¶¶ 8, 12, 15, Tables 6-9, 16, FEC Exh. 3).

61. In each of the last five two-year election cycles, the Republican national party committees [**35] (the RNC, NRSC and NRCC) have raised hundreds of millions of dollars of hard money. (Biersack Decl. ¶ 3, Table 1, FEC Exh. 3). In the 2000 election cycle, the Republican national party committees raised $361,588,430 of hard money. (*Id.*) In the 2002 election cycle, the Republican national party committees raised $352,876,067 of hard money. (*Id.*) In the 2004 election cycle, the Republican national party committees raised $657,113,369 of hard money. (*Id.*) In the 2006 election cycle, the Republican national party committees raised $508,120,158 of hard money. [*518] (*Id.*) In the 2008 election cycle, the Republican national party committees raised $640,308,267 of hard money. (*Id.*) (FEC Fact 34).

62. In each of the last five two-year election cycles, the Democratic national party committees (the DNC, DSCC and DCCC) have raised hundreds of millions of dollars of hard money. (Biersack Decl. ¶ 3, Table 2, FEC Exh. 3). In the 2000 election cycle, the Democratic national party committees raised $212,880,651 of hard money. (*Id.*) In the 2002 election cycle, the Democratic national party committees raised $162,325,003 of hard money. (*Id.*) In the 2004 election cycle, the Democratic national party committees raised $586,244,028 of hard

money. (*Id.*) In the 2006 election cycle, the Democratic national party committees raised $392,089,836 of hard money. (*Id.*) In the 2008 election cycle, the Democratic national party committees raised $599,113,650 of hard money. (*Id.*)

63. In each of the last five two-year election cycles, Republican state and local party committees, in the aggregate, have raised well over $100 million of hard money. (Biersack Decl. ¶ 5, Table 4, FEC Exh. 3). In each of the last five election cycles, Democratic state and local [**36] party committees, in the aggregate, have also raised well over $100 million of hard money. (*Id.*)

64. In the 2008 Presidential campaign, national committees of political parties were permitted to make coordinated expenditures with their candidates of up to $19,151,200, in addition to the contributions the party committees may make under 2 U.S.C. § 441a(a)(2)(A). 2 U.S.C. § 441a(d)(2); 11 C.F.R. § 109.33; Price Index Increases for Expenditure Limitations, 73 Fed. Reg. 8698 (Feb. 14, 2008). (J. Stip. at 7).

65. In the 2008 election cycle, Republican party committees (including national, state, and local committees) supported their federal candidates with $31,952,985 in coordinated expenditures, and Democratic party committees (including national, state, and local committees) supported their federal candidates with $37,988,558 in coordinated expenditures. In the 2006 election cycle, six candidates for U.S. Senate each received $1 million or more in coordinated expenditures from their parties. (Biersack Decl. ¶ 11, 14, Tables 14, 21, 22, FEC Exh. 3).

66. In the 2008 cycle, the six national party committees provided significant support to their candidates in

contributions. The Republican national committees contributed $1,286,809 to their federal candidates. The Democratic national committees contributed $571,365 to their federal candidates. (Biersack Decl. ¶ 12, Table 16, FEC Exh. 3).

67. During each of the last five two-year election cycles, the Republican national party committees have made millions of dollars of expenditures in coordination with federal [**37] candidates, from a low of $13,310,534 in the 2006 cycle to a high of $29,807,792 in the 2008 cycle. (Biersack Decl. ¶ 8, Table 6, FEC Exh. 3).

68. Over each of the last five two-year election cycles, the Democratic national party committees have made millions of dollars of expenditures in coordination with federal candidates, from a low of $2,333,942 in the 2002 cycle to a high of $22,914,903 in the 2004 cycle. (Biersack Decl. ¶ 8, Table 8, FEC Exh. 3).

69. In the 2008 cycle, parties made $280,873,688 in independent expenditures. The Democratic party committees spent $156,191,039 and the Republican party committees spent $124,682,649 in independent expenditures. (Biersack Decl. ¶ 11, Table 15, FEC Exh. 3).

70. During the last three two-year election cycles, both major parties' national [*519] committees have averaged well over $100 million in independent campaign expenditures. Republican national party committees made $84,906,626 of independent expenditures in 2004, $115,241,737 of independent expenditures in 2006, and $123,416,207 of independent expenditures in 2008. (Biersack Decl. ¶ 8, Table 7, FEC Exh. 3). Democratic national party committees made $175,982,712 of independent expenditures in 2004, $106,745,614 of independent expenditures in 2006, and $155,773,969

of independent expenditures in 2008. (Biersack Decl. ¶ 8, Table 9, FEC Exh. 3). During those same cycles, both major parties' state and local committees also spent millions of dollars on independent expenditures. The Republican state and local parties spent $1,266,442 in 2008, $404,650 in 2006, and $3,125,756 in 2004. The Democratic state and local [**38] party committees spent $417,070 in 2008, $1,354,651 in 2006, and $508,984 in 2004. (Biersack Decl. ¶ 10, Table 12-13, FEC Exh. 3).

E. The Relationship between National and State Parties, Candidates, and Donors

The Role of Political Parties

71. National political parties are "'inextricably intertwined with federal officeholders and candidates.'" (*McConnell v. FEC,* 540 U.S. 93, 155, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (quoting 148 Cong. Rec. H409 (Feb. 13, 2002))). "Candidates are the rallying points for the party." (Krasno Rept. at 5, FEC Exh. 1).

72. The Supreme Court has found that "'there is no meaningful separation between the national party committees and the public officials who control them.'" (*McConnell,* 540 U.S. at 155, 124 S.Ct. 619 (quoting *McConnell v. FEC,* 251 F.Supp.2d 176, 468-69 (D.D.C.2003) (Kollar-Kotelly, J.))).

73. The RNC has "constant contact" with candidates at the height of an election. (Josefiak Dep. at 37, FEC Facts Exh. 5). (J. Stip. at 2).

74. "The President typically controls his party's national committee, and once a favorite has emerged for the presidential nomination of the other party, that candidate and his party's national committee typically work closely together." *McConnell v. FEC,* 251

F.Supp.2d 176, 697 (D.D.C.2003) (Kollar-Kotelly, J.). (J. Stip. at 3).

75. Party organizations, particularly those at the national level, directly assist federal candidates [**39] by providing them with campaign contributions, coordinated expenditures, and assistance in areas of campaigning that require expertise and in-depth research. They also help candidates raise funds and campaign support from other groups. The parties' close involvement in political campaigns gives them a special relationship with candidates. (RNC Resps. to FEC's First *McConnell* RFA's, Nos. 17-19, 55 [DEV 12-Tab 10], FEC Exh. 42).

76. Party organizations recruit candidates and write the rules that govern nomination campaigns. Party organizations also assist general election candidates with their campaigns, providing many with money, political expertise, media and other election services, volunteers, and some of the other resources that are needed to wage an election campaign. Parties also help candidates collect money and other campaign resources from interest groups and individuals who are active in politics. In addition, party organizations communicate messages designed to benefit a party's entire ticket or intended to help individual candidates win their races. (D. Green *McConnell* Rebuttal Report at 7-9 [DEV 5-Tab 1], FEC Exh. 41; Declaration of Rocky Pennington in *McConnell v. FEC* [*520] ¶ 5 [DEV 8-Tab 31], FEC Exh. 43; Declaration of Linda W. Chapin in *McConnell v. FEC* ¶ 5 [DEV 6-Tab 12], FEC Exh. 44; Declaration of Terry S. Beckett in *McConnell v. FEC* ¶ 5 [DEV 6-Tab 3], FEC Exh. 45).

77. One historic role that parties have played is to continue to operate between elections so that each new

candidate campaign need not start from scratch. Parties have historically been considered "socializing institutions that help bring citizens into the political system, serve as an outlet for their political energy by recruiting them to work in campaigns, and help mobilize [**40] voters." (Krasno Rept. at 7, FEC Exh. 1).

78. The strength of a political party can be judged not only by its finances, but also by its "organizational presence in a locale fueled by a combination of paid employees and, more likely, activists and other party members" and the "attention and energy of party members." (Krasno Rept. at 8, FEC Exh. 1).

Parties Direct their Resources Strategically to have Maximum Impact

79. Political parties "try to maximize their impact by working hardest in-or targeting-the races they deem closest." (Krasno Rept. at 19, FEC Exh. 1). Parties "try to spend less on uncompetitive races in order to spend more on competitive ones." (*Id.*)

80. Political parties "allocate[ ] money based on a number of factors, including 'the financial strength of the campaign,' 'what [the candidate's] poll numbers looked like,' and 'who had the best chance of winning or who needed the money most.'" *Colorado II,* 533 U.S. at 478, 121 S.Ct. 2351 (quoting, *inter alia,* declaration of Robert Hickmott, former Democratic fundraiser and National Finance Director for Timothy Wirth's Senate campaign, in *Colorado II* (Hickmott *Colorado II* Decl.), [DEV 76-Tab 121], FEC Exh. 34). "[T]he primary consideration in allocating funds is which races are marginal-that is, which races are ones where party money could be the difference between winning and losing . . ." *FEC v. Colorado Republican Fed. Campaign*

Comm., 41 F.Supp.2d 1197, 1203 (1999) (Nottingham, J.).

[**41] 81. The RNC decides to spend money in particular races primarily based upon "how competitive the race is and the commitment that the National Committee wants to make to making its position known in that race." (RNC 30(b)(6) Dep. at 55-56, FEC Exh. 5). The RNC does not spend money on states that are considered uncompetitive, for example if "there is no chance that the RNC is going to be able to win any of the races, and it's just taking away money from one competitive state and giving it to a state that won't have any impact on." (*Id.* at 27-28). The RNC also does not spend money in races unless it is convinced that the Republican running is "a legitimate candidate." (*Id.* at 78).

82. As a result of their focus on close races, party committees like the RNC rarely reach their legal limit for coordinated expenditures in a particular House or Senate race. There are 435 seats in the U.S. House of Representatives, each of which is filled by an election during every two-year election cycle. U.S. Const. art. I, § 2; 2 U.S.C. § 2. There are 100 seats in the U.S. Senate, and one third of the total Senate membership is elected every two-year election cycle. U.S. Const. art. I, § 3. Although there are at least 468 federal elections each cycle, Republican committees reached the maximum amount of coordinated expenditures in only seven congressional races in 2008, and in two races in 2006. (Biersack Decl. at ¶ 13, Tables 17 & 18, FEC Exh. 3). Democratic committees only reached the legal limit in [*521] ten congressional races in 2008 and twelve races in 2006. (*Id.*)

83. Parties make no coordinated expenditures at all in

many federal elections. In 2008, only 99 Republican candidates for Congress received coordinated expenditures from political parties, [**42] and in 2006 only 88 did. (Biersack Decl. at ¶ 13, Tables 17-18, FEC Exh. 3). Democratic party committees only made coordinated expenditures for 168 of their congressional candidates in 2008 and 201 of them in 2006. (*Id.*).

84. In only a small fraction of races do party committees spend 95% or more of the coordinated expenditures available to them under the Act. Republican committees only reached the 95% threshold in coordinated expenditures in 61 congressional races in 2008, and in 54 races in 2006. (Biersack Decl. at ¶ 13, Tables 17 & 18, FEC Exh. 3). Democratic committees only reached the 95% standard in 30 congressional races for each of the last two election cycles. (*Id.*)

85. Party committees typically reach the 95% threshold only in the most competitive races. The Cook Political Report is a newsletter that assesses the competitiveness of various elections. (About the Cook Report, http:// www.cookpolitical.com/node/1774, FEC Exh. 19 ("The Cook Political Report is an independent, non-partisan newsletter that analyzes elections and campaigns for the U.S. House of Representatives, U.S. Senate, Governors and President as well as American political trends.")). Cross-referencing Republican party spending to the 95% threshold with the Cook Report analysis of 2008 House and Senate races (October 23, 2008) shows that:

a. Republican committees reached the threshold in 29 of 36 "Toss up" races (81%). (Biersack Decl. at ¶ 14, Table 19, FEC Exh. 3; 2008 Competitive House Race Chart (Oct. 23, 2008) (Cook House Chart), FEC Exh. 20, http://www.cookpolitical.com/charts/house/competit

ive_2008-10-23_11-33-46.php; 2008 Senate Race Ratings (Oct. 23, 2008) (Cook Senate Chart), FEC Exh. 21,[**43] http://www.cookpolitical.com/ charts/senate/raceratings_ 2008-10-23_11-37-46.php).

b. Republican committees reached the threshold in 9 of 15 "Lean Democratic" races (60%). (Biersack Decl. at ¶ 14, Table 19, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

c. Republican Committees reached the threshold in 9 of 16 "Lean Republican" races (56%). (Biersack Decl. at ¶ 14, Table 19, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

d. Republican Committees reached the threshold in 4 of 18 "Likely Democratic" races (22%). (Biersack Decl. at ¶ 14, Table 19, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

e. Republican Committees reached the threshold in 3 of 21 "Likely Republican" races (14%). (Biersack Decl. at ¶ 14, Table 19, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

f. Republican Committees reached the threshold in 7 of 364 of races judged as not competitive nor likely to become competitive (2%). (Biersack Decl. at ¶ 14, Table 19, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

86. Cross-referencing Democratic spending to the 95% threshold with the Cook Report analysis of 2008 House and Senate races (October 23, 2008) shows that:

a. Democratic committees reached the threshold in 10 of 36 "Toss up" races (28%). (Biersack Decl. at ¶ 14, Table 20, [*522] FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

[**44] b. Democratic committees reached the

threshold in 1 of 15 "Lean Democratic" races (13%). (Biersack Decl. at ¶ 14, Table 20, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

c. Democratic committees reached the threshold in 6 of 16 "Lean Republican" races (38%). (Biersack Decl. at ¶ 14, Table 20, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

d. Democratic committees reached the threshold in 2 of 18 "Likely Democratic" races (11%). (Biersack Decl. at ¶ 14, Table 20, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

e. Democratic Committees reached the threshold in 4 of 21 "Likely Republican" races (14%). (Biersack Decl. at ¶ 14, Table 20, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

f. Democratic Committees reached the threshold in 6 of 364 of races judged as not competitive nor likely to become competitive (2%). (Biersack Decl. at ¶ 14, Table 20, FEC Exh. 3; Cook House Chart, FEC Exh. 20; Cook Senate Chart, FEC Exh. 21).

87. The majority of 2008 House and Senate general elections were not close, and in those races, party coordinated expenditures were rare. In 322 of the 470 general elections (69%), a candidate received over 60% of the vote. (Official Election Results for U.S. Senate/Official Election Results for U.S. House of Representatives (Official 2008 Election Results), http://www.fec.gov/pubrec/fe2008/2008congresults.pdf). Despite the fact that the majority of races involved a candidate receiving over 60% of the vote, such races only made up a tiny [**45] minority of races in which the Republican or Democratic parties spent 95% or more of the coordinated expenditures available to them under the Act. Of

the 61 races in which Republican party committees reached the 95% threshold, only two races (3%) featured a candidate who received over 60% of the vote. (Biersack Decl. at ¶ 14, Table 19, FEC Exh. 3; Official 2008 Election Results). Of the 30 races in which Democratic party committees reached the 95% threshold, only three races (10%) featured a candidate who received over 60% of the vote. (Biersack Decl. at ¶ 14, Table 20, FEC Exh. 3; Official 2008 Election Results).

Party Committees Facilitate Their Largest Donors' Access to Federal Candidates and Officeholders

88. Martin Meehan was a Democratic Congressman from Massachusetts between 1993 and 2007, and he has provided a declaration in this case. (Declaration of Martin Meehan (Meehan Decl.) at ¶ 1, FEC Exh. 2). Congressman Meehan stated that "[p]arty fundraising serves as a mechanism for major donors to get special access to lawmakers." (*Id.* at ¶ 8).

89. "At the request of the party, Members of Congress call prospective donors from lists provided by the party to ask them to participate in party events, such as [DCCC or DNC] dinners." (Meehan Decl. at ¶ 9, FEC Exh. 2). National parties' "fundraising events often [ ] feature members of Congress as draws, and they explicitly offer donors the opportunity to meet and get to know various officials." (Krasno Rept. at 5, FEC Exh. 1 (footnote omitted)).

90. Prior to the passage of BCRA in 2002, large donations often provided access for those donors to federal officeholders. (*McConnell*, 540 U.S. at 150-52, 124 S.Ct. 619 ("The record in the present [**46] case[ ] is [*523] replete with . . . examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations. . . . [T]he

RNC holds out the prospect of access to officeholders to attract soft-money donations and encourages officeholders to meet with large soft-money donors.") (citing *McConnell,* 251 F.Supp.2d at 500-03 (Kollar-Kotelly, J.), 860-61 (Leon, J.))).

91. Notably, though, the RNC does not accept earmarked contributions, as defined in 11 C.F.R. § 110.6, for any particular candidate. (Josefiak Dep. at 48, FEC Facts Exh. 5).

92. The LA-GOP has ongoing and continuous contact with the RNC as well as federal candidates in Louisiana. (Buckels Dep. at 19-21, FEC Facts Exh. 6). (J. Stip. at 3).

93. One of the purposes of state party committees like LA-GOP is to assist in the election of candidates for federal office. (Buckels Dep. at 19-20, FEC Facts Exh. 6). In constructing a "victory plan," Republican federal candidates have meetings with both the national parties and the state party. (Josefiak Dep. at 27, FEC Facts Exh. 5). State and local party organizations assist federal candidates with voter mobilization and grassroots activities. (D. Green *McConnell* Rebuttal Report at 10-15 [DEV 5-Tab 1],1 FEC Facts Exh. 41; Krasno and Sorauf *McConnell* Report at 44-50 [DEV 1-Tab 2], FEC Facts Exh. 39; Expert Report of Thomas E. Mann from *McConnell* (Mann *McConnell* Report) at 30 [DEV 1-Tab 1], FEC Facts Exh. 53). (J. Stip. at 3-4).

[**47] 94. During an election cycle, LA-GOP also has "constant contact" with the party's federal candidates. (LA-GOP 30(b)(6) Dep. at 19-20, FEC Exh. 6). Republican federal officeholders from Louisiana, by virtue of their office, automatically hold the position of an "exofficio, nonvoting Member" of the State Central Committee of LA-GOP during their time in office.

LA-GOP Bylaws, Art III § 2, FEC Exh. 16. Congressman Cao serves as a member of the State Central Committee for the LA-GOP and the Parish Executive Committee for the Republican party. (Cao Dep. at 10, FEC Exh. 4).

95. When federal candidates and officeholders have asked about donors to LA-GOP, the party has "shared that donor list." (LA-GOP 30(b)(6) Dep. at 25-26, FEC Exh. 6). The sharing of information also happens in the other direction-LA-GOP receives information from federal candidates about who has contributed to their campaigns. (*Id.* at 26).

96. LA-GOP encourages federal candidates to tell their donors to also contribute to LA-GOP. (LA-GOP 30(b)(6) Dep. at 148, FEC Exh. 6). Donors who have contributed the maximum allowable contribution to an individual candidate are encouraged to contribute more to LA-GOP. (*Id.* at 147; *see also* Meehan Decl. at ¶ 10, FEC Exh. 2). Then-candidate Cao's 2008 campaign was expected not only to raise money for his campaign, but also to raise money for LA-GOP. (Cao Dep. at 16, FEC Exh. 4 ("we had to raise some money for the state party."). Volunteers for the Cao campaign solicited contributions to LA-GOP. (*Id.* at 16-17).

97. Even after the passage of the soft money restrictions in BCRA, large donors to political [**48] parties are able to receive access to federal officeholders unavailable to the public. To facilitate its donors' access to federal candidates and officeholders, the RNC organizes "fulfillment" events to which individuals who have made a large contribution to the RNC of a specified amount are invited, and which officeholders such as the President, Vice-President or other prominent Republicans also attend. (RNC 30(b)(6) Dep. at 27-30,

FEC Exh. 5; *Id.* at 39-40 ("they will have, you [*524] know, basically fulfillment requirements where they will be at some resort, they play a little golf, hear speakers on various issues, and so that will be an ongoing process.")).

98. These opportunities are only offered to individuals who are "fully contributing" the amount to the RNC that is required to attend the event. (RNC 30(b)(6) Dep. at 44-45, FEC Exh. 5). The RNC has created tiers of donors with specified benefits based on levels of annual giving: For example, donors who give $15,000 receive "intimate luncheons, dinners, and meetings with key policymakers"; donors who give $30,400 "enjoy exclusive private functions with elected Republican leaders"; and donors who commit to raising $60,800 receive "at least one . . . exclusive event during the year," as well as other "intimate events with key GOP policymakers." (Republican National Committee Major Donor Groups 2009, FEC Exh. 25).

99. For example, at one Republican party event on November 1, 2007, the President of the United States, six U.S. Senators, and one U.S. Representative attended a dinner with just forty-nine donors. (New Republican Regents Dinner Invitation (Nov. 1, 2007), FEC Exh. 26). The RNC has organized even smaller Presidential appearances in private homes-events at which the President has been joined by as few as thirty-nine donors. (RNC Luncheon Invitation (Sept. 26, [**49] 2007), FEC Exh. 27) (thirty-nine attendees); (RNC Presidential Trust Dinner Invitation (March 18, 2008), FEC Exh. 28) (forty-one attendees); (RNC Presidential Trust Luncheon Invitation (March 18, 2008), FEC Exh. 29) (fifty-two attendees). And the RNC has arranged similar interactions with executive

branch officials: Senior White House official Karl Rove had breakfast with twenty-eight donors (RNC Breakfast with Karl Rove Invitation (Oct. 10, 2006), FEC Exh. 30) and White House Chief of Staff Joshua Bolten had lunch with thirty-seven donors (RNC Luncheon with Josh Bolten Invitation (Oct. 19, 2006), FEC Exh. 31). According to the RNC, however, the actual interaction between donors and candidates or office holders at these events is minimal. "It's basically cookie cutter. Individuals go and socialize. The president, for example, would come, make a speech on a topic for 45 minutes, photo op and leave. . . . It's not like they sit around and have one-on-one like we're having here today." (Josefiak Dep. 45:19-46:3).

100. In *McConnell,* the Supreme Court expressed concerns about the appearance of corruption. Through lobbyists and others, "national parties have actively exploited the belief that contributions purchase influence or protection to pressure donors into making contributions." *McConnell,* 540 U.S. at 148 n. 47, 124 S.Ct. 619. As the CEO of a major corporate donor explained, if a corporation had given a lot of money to one party, "the other side," i.e., the opposing national party committee, might have "a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed." (*Id.* (internal quotation marks omitted)).

[**50] *Federal Candidates and Officeholders Know the Identity of Their Parties' Large Donors*

101. Despite the soft money restrictions in BCRA, individual donors can still contribute up to $30,400 to a national party committee each year and multi candidate PACs can still contribute up to $15,000 to a

national party committee each year. 2 U.S.C. §§ 441a(a)(1)(2); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435, 7436-37 (Feb. 17, 2009).

102. Federal candidates and officeholders can learn the identity of individuals who [*525] have made large donations to their party. (Meehan Decl. at ¶ 8, FEC Exh. 2) ("Office holders and candidates know who the major donors to their parties are.").

103. One method by which parties and candidates learn the identity of one another's contributors is through the use of joint fundraising committees. (Krasno Rept. at 5, FEC Exh. 1). These committees hold joint fundraising events where donors contribute both to candidates and parties. (*Id.*). Such joint fundraising events are a "trend" that has "becom[e] more and more prevalent." (RNC 30(b)(6) Dep. at 52, FEC Exh. 5).

104. It is not only "contributions made at the express behest of" a candidate that raise corruption concerns, *McConnell*, 540 U.S. at 152, 124 S.Ct. 619, but also other contributions, because "[e]lected officials know exactly who the big party contributors are." (Declaration of Senator Warren Rudman in *McConnell* ¶ 12 [DEV 8-Tab 34], FEC Exh. 46; *accord* Declaration of Alan K. Simpson in *McConnell* (Simpson *McConnell* Decl.) ¶ 5 [DEV 9-Tab 38], FEC Exh. 47; Declaration of [**51] Gerald Greenwald in *McConnell* ¶ 11 [DEV 6-Tab 16], FEC Exh. 48).

105. Federal officeholders are "well aware of the identities of the donors: National party committees would distribute lists of potential or actual donors, or donors themselves would report their generosity to

officeholders." *McConnell,* 540 U.S. at 147, 124 S.Ct. 619. "'[F]or a member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves.'" *Id.* (quoting *McConnell,* 251 F.Supp.2d at 487-88) (Kollar-Kotelly, J.) (emphasis added); *see also id.* (citing *McConnell,* 251 F.Supp.2d at 853-55 (Leon, J.)).

State and Local Political Parties Are Particularly Well Suited to Facilitate Their Largest Donors' Access to Federal Candidates and Officeholders

106. State and local parties are "entities uniquely positioned to serve as conduits for corruption" because of their close connection to the national parties and to federal officeholders and candidates. *McConnell,* 540 U.S. at 156 n. 51, 124 S.Ct. 619; *see also id.* at 161, 124 S.Ct. 619. Federal candidates and officeholders raise funds for national and state parties. Congressman Meehan "helped the DCCC, the DNC and the Massachusetts Democratic Party raise more than $300,000 in the two elections cycles prior to [his] resignation from office." (Meehan Decl. at ¶ 12, FEC Exh. 2). In fundraising for the Massachusetts Democratic Party, Congressman Meehan "signed onto invitations to political fundraisers" and "made fundraising phone calls to active Democrats to ask them to participate in a given event or coordinated campaign." (*Id.* at ¶ 13).

107. "Congress recognized that" there were also "close ties between federal candidates and state [**52] party committees," and concluded-"based on the evidence before it"-that "state committees function as an alternative avenue for precisely the same corrupting forces" as the national party committees. *McConnell,* 540 U.S. at 161, 164, 124 S.Ct. 619.

108. The very structure of the state and national parties assures that each will be closely linked to the other. For example, the 168 members of the RNC include the chairperson of each state and territorial Republican party, as well as a "National Committeeman" and a "National Committeewoman" from each state and territorial party. (RNC 30(b)(6) Dep. at 12, FEC Exh. 5; LA-GOP 30(b)(6) Dep. at 15, FEC Exh. 6; *Bylaws of the State Central Committee of the Republican Party of Louisiana* [*526] (June 7, 2008) (LA-GOP Bylaws), Art. V § 5, FEC Exh. 16 ("The National Committeeman and National Committeewoman shall serve as the representatives of the Party to the Republican National Committee, shall prepare a joint written report annually summarizing the activities of the Republican National Committee, shall submit said report to the State Central Committee at the first quarterly meeting each year and shall perform such other duties as are assigned by the State Central Committee or by the Executive Committee.")). The Bylaws Committee of LA-GOP considers and reports to the State Central Committee regarding such federal issues as "proposed reapportionment plans" "the endorsement of candidates," "the selection of delegates to the Republican National Convention" and "the conduct of Presidential caucuses or primaries." (LA-GOP Bylaws, Art VII § 1, FEC Exh. 16).

F. The Supreme Court has Recognized that Coordinated Expenditures Present a Risk of Corruption or the Circumvention of Contribution Limits

109. "Coordinated expenditures of money donated to a party are tailor-made to undermine [**53] contribution limits." *Colorado II,* 533 U.S. at 464, 121 S.Ct. 2351.

(FEC Fact 117).

110. The RNC encourages its candidates to tell their "maxed out" donors to contribute to the RNC. (RNC 30(b)(6) Dep. at 56-57, FEC Exh. 5). Congressman Cao has personally suggested to donors who had given the maximum amount to his campaign that they could also contribute to the party. (Cao Dep. at 17, FEC Exh. 4).

111. "Donors give to the party with the tacit understanding that the favored candidate will benefit." *Colorado II*, 533 U.S. at 458, 121 S.Ct. 2351 (citing Hickmott *Colorado II* Decl., FEC Exh. 34 ("We . . . told contributors who had made the maximum allowable contribution to the Wirth campaign but who wanted to do more that they could raise money for the DSCC so that we could get our maximum [Party Expenditure Provision] allocation from the DSCC")).

112. "[I]f a candidate could be assured that donations through a party could result in funds passed through to him for spending on virtually identical items as his own campaign funds, a candidate enjoying the patronage of affluent contributors would have a strong incentive not merely to direct donors to his party, but to promote circumvention as a step toward reducing the number of donors requiring time-consuming cultivation." *Colorado II*, 533 U.S. at 460, 121 S.Ct. 2351.

113. "If a candidate could arrange for a party committee to foot his bills, to be paid with $20,000 contributions to the party by his supporters, the number of donors necessary to raise $1,000,000 could be reduced from 500 (at $2,000 per cycle) to 46 (at $2,000 to the candidate and [**54]$20,000 to the party, without regard to donations outside the election year)." *Colorado II*, 533 U.S. at 460, 121 S.Ct. 2351 (footnote

omitted) (discussing candidate incentives using the contribution limits applicable at the time of that case).

114. "The same enhanced value of coordinated spending that could be expected to promote greater circumvention of contribution limits for the benefit of the candidate-fundraiser would probably enhance the power of the fundraiser to use circumvention as a tactic to increase personal power and a claim to party leadership." *Colorado II,* 533 U.S. at 460 n. 23, 121 S.Ct. 2351. "If the effectiveness of party spending could be enhanced by limitless coordination, the ties of straitened candidates to prosperous ones and, vicariously, to large donors would be reinforced as well. Party officials who control distribution [*527] of coordinated expenditures would obviously form an additional link in this chain." *Id.* ("[The DSCC's three-member Executive Committee] basically made the decisions as to how to distribute the money. . . . Taking away the limits on coordinated expenditures would result in a fundamental transferal of power to certain individual Senators") (citing Billings *Colorado II* Decl. ¶¶ 3, 19, FEC Exh. 36).

115. "Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Colorado II,* 533 U.S. at 457, 121 S.Ct. 2351 (footnote omitted).

[55] G. Political Parties' Primary Interest is Winning Elections**

116. A primary goal of all the major political parties is to win elections. "The ultimate goal of a political party

is to get as many party members as possible into elective office, and in doing so to increase voting and party activity by average party members." (Meehan Decl. at ¶ 5, FEC Exh. 2). "In practice, electing . . . candidates is the RNC's primary focus." *McConnell*, 251 F.Supp.2d at 470 (Kollar-Kotelly, J.).

117. Senator McCain testified, in connection with the *McConnell* litigation, that "[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected." (McCain *McConnell* Decl. ¶ 23 [DEV 8-Tab 29], FEC Exh. 51). Then-RNC Chairman Haley Barbour stated: "The purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president. . . . Electing Dole is our highest priority, but it is not our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures."). (Chairman's Update to the Members of the Republican National Committee (Aug. 7, 1996) ODP0021-02003 [DEV 70-Tab 48], FEC Exh. 54). Senator Bumpers testified that he was "not aware that the party has any interest in the outcome of public policy debates that is separate from its interest in supporting and electing its candidates." (Bumpers *McConnell* Decl. ¶ 6 [DEV 6-Tab 10], FEC Exh. 50).

118. State parties also have the primary purpose of winning elections. The "basic role" of the LA-GOP is "to elect Republican candidates to office." (LA-GOP 30(b)(6) Dep. at 18-19, FEC [**56] Exh. 6). LA-GOP is in constant contact with the federal candidates in Louisiana during an election cycle for the purpose of "[g]etting them elected." (*Id.* at 20; *Id.* at 70

("[C]ertainly we're concerned about issues, but our main emphasis is to run communication in support of electing our candidates.")).

119. The RNC has not been engaged in any sorts of activities that do not reference federal candidates "in a long time." (RNC 30(b)(6) Dep. at 143-45, FEC Exh. 5).

H. Plaintiffs' Factual and Legal Claims

Unambiguously Campaign Related Argument

120. Plaintiffs have challenged, *inter alia*, the application of coordinated expenditure limits to party activities that plaintiffs assert are not "unambiguously campaign related." AVC ¶¶ 52-60, 76-81. (J. Stip. at 9). Plaintiffs explain what they mean by "unambiguously campaign related" both by listing the few activities that purportedly fall within this category, and by listing [*528] many other activities that plaintiffs believe do not fall within the category. (*Id.* at ¶¶ 40, 59, 80).

121. Plaintiffs state that the only activities that political parties engage in that are "unambiguously campaign related" are "(a) communications containing express advocacy (explicit words expressly advocating the election or defeat of a clearly identified federal candidate); (b) targeted federal election activity (voter registration, voter identification, get-out the vote, and generic campaign activities that are targeted to help elect the federal candidate involved); (c) paying a candidate's bills; and (d) distributing a candidate's campaign literature." [**57] Plaintiffs claim that no activities by political parties other than the four activities described above are "unambiguously campaign related" and therefore no others can be regulated or restricted under the Constitution. (Complaint ¶¶ 59,

80 (Rec. Doc. 35)).

122. Plaintiffs state that coordinated "non-targeted voter registration; non-targeted voter identification; non-targeted get-out-the-vote activity and non-targeted generic campaign activity" are not "unambiguously campaign related" and therefore cannot be regulated or restricted. AVC ¶¶ 40, 59, 80. (J. Stip. at 10).

123. Plaintiffs currently claim that virtually all voter registration, voter identification, get-out-the-vote activity and generic campaign activity is "non-targeted." (RNC 30(b)(6) Dep. at 150-53, FEC Exh. 5).

124. "[P]arties do not generally engage in . . . GOTV activity, voter identification, or voter registration, for any purpose other than to assist in their efforts to elect party members to public office." (Meehan Decl. at ¶ 7, FEC Exh. 2). Voter registration, voter identification, get-out-the-vote (GOTV) activity, and generic campaign activity as defined by BCRA "clearly capture activity that benefits federal candidates," and "funding of such activities creates a significant risk of actual and apparent corruption." *McConnell,* 540 U.S. at 167-68, 124 S.Ct. 619. *See McConnell,* 251 F.Supp.2d at 460 ("Common sense dictates, and it was 'undisputed' below, that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office") (Kollar-Kotelly, J.). *See id.*, at 459 (" '[The evidence] shows quite clearly that a campaign that mobilizes [**58] residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate. . .. [G]eneric campaign activity has a direct effect on federal elections' " (quoting Green Expert

Report 14)). *Id.* (footnote omitted); RNC Memorandum, *Non-Allocable Party Building Programs,* RNC 0084450-64 at 0084455 [DEV 101], FEC Exh. 56 ("There are certain election related party expenditures that make no reference to any specific candidates but do benefit the entire Republican ticket. . . . These generic programs include voter registration[ ] and GOTV programs. . . . These programs and projects benefit the Republican Party and all of its candidates, federal and state."); Excerpt of Deposition of Alan Philp from *McConnell* at 49, FEC Exh. 57 (Chairman of Colorado Republican Party testifying that state party's "Get-out-the-vote program is designed to benefit all candidates. That could include voter registration and so on and so forth. Q. And is the same true of generic party advertising, in other words, Vote Republican, that's designed to benefit all the candidates? A. Yes.").

125. In 2008, then-RNC Chairman Duncan stated publicly that the RNC's "prodigious fundraising" has allowed it to "buil[d] up over a long period of time" a GOTV program and other "organizational [*529] efforts [that] make the difference . . . generally, there's probably a 2 to 5 percent difference in additional turnout for a candidate that you make." (*Victory Dream Team,* CONGRESS DAILY, July 29, 2008, 2008 WLNR 14131041, FEC Exh. 18). This "difference" applies to federal, state, and local candidates. (*Id.*)

[**59] 126. The RNC acknowledges it would like to coordinate with candidates the "nontargeted" activities within the scope of its claims at least in part "in an effort to help candidates win elections. . . ." (RNC 30(b)(6) Dep. at 153-54, FEC Exh. 5).

127. If voter registration, voter identification,

get-out-the-vote activity or generic campaign activity takes place in more than one congressional district, plaintiffs consider it "nontargeted." (RNC 30(b)(6) Dep. at 151, FEC Exh. 5 ("[if] you were having a voter registration drive in multiple districts outside of any election, then I don't think that's [ ] targeted.")).

128. If voter registration, voter identification, get-out-the-vote activity or generic campaign activity takes place in only part of a congressional district, Plaintiffs consider it "nontargeted." (RNC 30(b)(6) Dep. at 151, FEC Exh. 5 ("If you had a voter registration drive in just one county, I would say that was a non-targeted voter registration drive, because you're not affecting the entire district of that candidate."); *Id.* at 152 ("Q. So it's only targeted if it's exactly every district, every part of a district and not anything more, does that make sense? A. Right.")).

129. If voter registration is done in a district in a manner that references multiple candidates, plaintiffs consider it "non-targeted." (RNC 30(b)(6) Dep. at 153, FEC Exh. 5) ("in the example of the two, two or more candidates being mentioned, the answer is yes, that would not be targeted").

130. What plaintiffs consider "targeted" voter registration rarely happens "because voter registration is usually done statewide, or even if it's done within a district, there are multiple [**60] candidates on a ballot within the district." (RNC 30(b)(6) Dep. at 150, FEC Exh. 5).

131. Voter identification, registration, or GOTV efforts that are conducted in a geographic area greater than or smaller than a single congressional district still benefit the campaign of a candidate running in a district in which the activity is undertaken. (Meehan Decl. at

¶ 25-26, FEC Exh. 2).

132. Plaintiffs also state that "issue advocacy, including ads that mention candidates" is not an "unambiguously campaign related" activity and therefore cannot be regulated or restricted, even within the 90-day or 120-day periods before an election. (AVC ¶¶ 40, 59, 80). According to plaintiffs, such ads can never constitutionally be regulated unless they contain "explicit words expressly advocating the election or defeat of a clearly identified federal candidate." (*Id.* at ¶¶ 59, 80).

133. Plaintiffs state that "public communications of any kind involving support or opposition to state candidates, support or opposition to political parties, or support or opposition to candidates generally of a political party" are not "unambiguously campaign related" and therefore cannot be regulated or restricted. (AVC ¶¶ 40, 59, 80). However, public communications that do not clearly identify any specific federal candidate are not considered party coordinated communications under Commission regulations. 11 C.F.R. § 109.37(a).

134. Plaintiffs' claim, if successful, would enable parties to run unlimited amounts of "issue [**61] ads" designed to influence federal elections, in coordination with candidates. Among the "issue ads" that plaintiffs have indicated they would have liked to have coordinated with then-candidate Cao and run just before the 2008 general election in Louisiana was one addressing former Congressman [*530] William Jefferson's "pending trial and alleged corruption." (AVC ¶ 48).

135. Plaintiffs' claim, if successful, would enable parties to run unlimited amounts of "grassroots lobbying" ads designed to influence federal elections, in

coordination with candidates. LA-GOP acknowledges that the reason it would like to coordinate its grassroots lobbying with candidates is that "it brings the candidate into the message and gives us a greater chance of electing a candidate." (LA-GOP 30(b)(6) Dep. at 72, FEC Exh. 6).

136. Congressman Cao testified that if the RNC could have engaged in more coordinated expenditures with his campaign, his preference would be that "the bulk of the money would go into-into TV, mailings, radio advertising." (Cao Dep. at 14-15, FEC Exh. 4). "When a party can run coordinated expenditures to ensure the candidate's name and image are on television during [the last week or so before a general election], this benefits the candidate's campaign and may even make the difference between election or defeat." (Meehan Decl. at ¶ 24, FEC Exh. 2).

137. None of the coordinated communications within the apparent scope of plaintiffs' claims are currently restricted by the limits on party coordinated communications until 90 days before a Congressional or Senate election, or 120 days before a Presidential election. A party communication prior to these 90-day or 120-day windows before an election is not deemed [**62] coordinated with a candidate unless it "disseminates, distributes, or republishes . . . campaign materials prepared by a candidate," or "expressly advocates the election or defeat of a clearly identified candidate." 11 C.F.R. §§ 109.21(c)(2)-(3); 109.37.

"Own Speech" Arguments

138. Plaintiffs have challenged the constitutionality of limits on party coordinated communications that represent a party's "own speech." (AVC ¶¶ 61-64,82-85). (J. Stip. at 10).

139. Plaintiffs currently allege that any time a political party pays for a communication and discloses publicly that it has done so, it is the party's "own speech" and therefore limits on such speech are unconstitutional. (Cao Dep. at 52, FEC Exh. 4 (stating that if a particular communication is paid for by the party, it is the party's "own speech."); LA-GOP 30(b)(6) Dep. at 124, FEC Exh. 6 (LA-GOP's "own speech" is "any communication that the LAGOP states through one form or another, that we have issued it, it is paid for by us . . . "); *id.* at 133 (it is the party's own speech "if we have taken responsibility, quote, ownership, of it by stating that we have paid for it . . . ."); RNC 30(b)(6) Dep. at 124, FEC Exh. 5 (communication becomes a party's "own speech" if the party "[a]pprove[s] it and pay[s] for it."); RNC's 2nd Discovery Resps., Interrog. 1, FEC Exh. 10 (communication is a party's "own speech" whenever it is indicated as such by "a disclaimer, where one is required, or by the speech being otherwise identified as the party's speech."); LA-GOP's 2nd Discovery Resps., Interrog. 1, FEC Exh. 11 (same)).

[**63] 140. Plaintiffs claim that a party coordinated communication disclosed as having been paid for by the party is the party's "own speech" even if a candidate or her campaign is materially involved in determining when the communication will be broadcast. (AVC ¶¶ 46-47; LA-GOP 30(b)(6) Dep. at 126, FEC Exh. 6).

141. Plaintiffs claim that a party coordinated communication disclosed as having been paid for by the party is the party's "own speech" even if a candidate or her campaign edits the content of the communication. (LA-GOP 30(b)(6) Dep. at 126-27, FEC Exh. 6; RNC 30(b)(6) Dep. at 167, FEC Exh. 5 ("the fact that the

RNC [*531] decided to run it with those edits, it would be the RNC's speech.")).

142. Plaintiffs claim that a party coordinated communication disclosed as having been paid for by the party is the party's "own speech" even if a candidate or her campaign decides which out of a group of proposed party communications should be broadcast. (LA-GOP 30(b)(6) Dep. at 128, FEC Exh. 6; RNC 30(b)(6) Dep. at 166-67, FEC Exh. 5).

143. Plaintiffs claim that a party coordinated communication disclosed as having been paid for by the party is the party's "own speech" even if the candidate or her campaign actually creates the communication and passes it along to the party. (LA-GOP 30(b)(6) Dep. at 127-28, FEC Exh. 6; RNC 30(b)(6) Dep. at 85-86, FEC Exh. 5 ("initially it would have been the campaign speech, but, then if the RNC approached to ask if they would buy the time, I think then it becomes the RNC's speech."); *id.* at 123-24 ("I don't believe, from a speech perspective, who [**64] prepares the actual script matters. It's whether or not the entity would accept that as its speech and pay for it.")).

144. Plaintiffs claim that a party coordinated communication disclosed as paid for by the party is the party's "own speech" even if a candidate indicates in the communication that he has approved the message. (LA-GOP 30(b)(6) Dep. at 128-29, FEC Exh. 6; RNC 30(b)(6) Dep. at 86, 107-108, FEC Exh. 5).

145. The only type of party-coordinated communication that plaintiffs believe is not a party's "own speech" and therefore may be constitutionally limited is one that a campaign airs and for which the party merely pays the bill. (LA-GOP 30(b)(6) Dep. at 129-30, FEC Exh. 6 ("If we are merely paying the bill, that is not our speech.");

id. at 145-46 ("Q. Can you think of any other example of a situation [other than paying a candidate's bill] where LAGOP would spend money on a public communication but it would not be LAGOP's own speech? A. No."); RNC's 2nd Discovery Resps., Interrog. 1, FEC Exh. 10 ("merely paying a candidate's bills is always subject to coordinated expenditure limits."); LA-GOP's 2nd Discovery Resps., Interrog. 1, FEC Exh. 11 (same)).

146. When Plaintiffs described the concept of "own speech" in the Complaint, they did not allege that party coordinated communications were the party's "own speech" so long as they were disclosed to have been paid for by the party. (AVC ¶¶ 62-63, 83). Rather, Plaintiffs stated that a communication is a party's "own speech" if it is "'not functionally identical to [**65] contributions' because it is 'not a mere general expression of support for the candidate and his views, but a communication of the underlying basis for the support,' not just 'symbolic expression, . . . but a clear manifestation of the party's most fundamental political views.' " (*Id.* at ¶¶ 62, 83) (quoting *Colorado II*, 533 U.S. at 468 & 468 n. 2, 121 S.Ct. 2351 (Thomas, J., dissenting) (internal quotations omitted)). Similarly, Plaintiffs stated in their first written discovery responses that a communication is a party's "own speech" if the communication contains the party's "underlying basis for support" because such speech would be "more than symbolic expression of support, even if coordinated." (RNC's Discovery Resps., Interrog. 5, FEC Exh. 7; LA-GOP's Discovery Resps., Interrog. 5, FEC Exh. 8).

147. Plaintiffs' Complaint identifies only a single example of what plaintiffs believe would constitute a

communication that falls within the "own speech" category-an advertisement allegedly written without Congressman Cao's involvement, but for which the party would consult with the Congressman as to "the best timing" to run the ad. (AVC ¶¶ 43-44, 46-47).

[*532] *Factual Claims*

148. RNC and LA-GOP each spent their $42,100 expenditure limits under the Party Expenditure Provision in connection with the campaign of Joseph Cao, and RNC reached its $5,000 contribution limit. RNC and LA-GOP each wanted to make more expenditures that would be subject to the $5,000 contribution limit and the $42,100 expenditure limit and would have done so if it were legal to do so. (AVC ¶ 39). (J. Stip. at 8).

[**66] 149. In addition, a specific express-advocacy communication that RNC intended to make, if legally permitted by the judicial relief sought in this case, is a radio ad (*RNC Cao Ad*) with the following script:

> Why We Support Cao
>
> The Republican National Committee has long stood for certain core principles, which we believe are the fundamentals of good government. When it comes to the issues of lower taxes, individual freedoms and a strong national defense, we need leaders who will stand with the American people and defend those issues.
>
> We need leaders who understand that our economy is in a recession, our individual freedoms are constantly under attack and we continue to fight the global war on terrorism to keep our families safe.
>
> Joseph Cao understands and fights for those

> issues. And, that is why we ask you to join us in supporting him on December 6. It's important for Louisiana and important for the country.

(AVC ¶ 43). (J. Stip. at 8).

150. RNC intended to coordinate the *RNC Cao Ad* with Joseph Cao as to the best timing for the *Ad*, but otherwise the *Ad* would not have been coordinated with Cao. (AVC ¶ 44). (J. Stip. at 8).

151. The LA-GOP intended to air an identical ad, and similarly wanted to coordinate with Cao only as to the timing of the ad. (J. Stip. at 8-9).

152. Some other specific activities that RNC intended to do and to coordinate with Joseph Cao, if legally permitted to do so without contribution or expenditure limits by the judicial relief sought in this case, were the following:

> Issue advocacy concerning U.S. Representative William Jefferson, including his:
>
> Position on the pending auto industry bailout;
>
> [**67] Position on serious ethics reform in Congress;
>
> Opposition to off-shore oil-drilling;
>
> Failure to support tax assistance for hurricane victims on the Gulf Coast;
>
> Support for taxpayer funding for Planned Parenthood;
>
> Support for increases in the federal income tax, the marriage tax penalty, the child tax credit, investment tax, and the death tax.

(AVC ¶ 45).

153. Some other specific activities that LA-GOP intends to do and to coordinate with Joseph Cao, if

legally permitted to do so without contribution or expenditure limits by the judicial relief sought in this case, are the following:

> issue-advocacy concerning U.S. Representative William Jefferson, including his: (a) pending trial and alleged corruption; (b) his repeated votes against off-shore oil-drilling; (c) vote to earmarks funds for a personal library and private office for Rep. Charles B. Rangel (Charlie Rangel has made campaign contributions to Jefferson); (d) vote against the financial bailout plan that included tax assistance for hurricane victims on the Gulf Coast; (e) vote to allow taxpayer funding for Planned Parenthood; (f) [*533] repeated votes to block consideration of the 2001 and 2003 cuts on income tax, the tax marriage penalty, the child tax credit, investment tax, and the death tax.
>
> issue advocacy and lobbying (direct and grassroots) on pending legislative matters, such as the auto industry bailout to be considered when Congress reconvenes December 2nd, encouraging Louisiana Second Congressional District voters to contact Representative Jefferson and insure that any measure has taxpayer protections and demands a 21 st century business model that includes renegotiated labor contracts.

(AVC ¶ 48, Buckels Dep. 91:2-8, 96:19-98:9, 99:22-100:16, 100:21-102:10).

154. RNC and LA-GOP want to make similar express-advocacy communications in the future, and there is a strong likelihood that the circumstances leading to this lawsuit will be repeated, given the

recurring nature of elections, the ongoing existence and intended activities of RNC and LA-GOP, and the regular recurrence of a broad range of issues in public and congressional [**68] debate. (AVC ¶ 50). (J. Stip. at 9).

155. During the 2008 cycle, then-candidate Cao's congressional campaign had receipts of $242,531, including $5,000 in contributions from the RNC and $500 from the South Carolina Republican Party, and also had the benefit of $83,971 in coordinated expenditures from the RNC (using its own and the LA-GOP's Section 441a(d) authority). (Biersack Decl. ¶ 16, Table 23, FEC Exh. 3). As of June 30, 2009, Mr. Cao reported receiving more funds for the upcoming 2010 election cycle than he received during the entire 2008 election cycle. In the current cycle, he has reported $516,957 in total receipts, including $4,560 from LA-GOP, and he has also had the benefit of $2,822 in coordinated expenditures. (*Id.*) As of June 30, 2009, Mr. Cao had already disbursed $185,668 in funds for the 2010 election. (*Id.*)

156. As a candidate, Cao found some of the independent expenditures conducted by Republican party groups to be counterproductive and harmful. His constituents held him accountable for the content, even though he was not consulted about the content and it was contrary to the goals of his campaign. (Cao Dep. at 34-35, 42-43, FEC Exh. 4). (J. Stip. at 9).

IV. Certification of Constitutional Questions

As set forth in Part II, the Cao plaintiffs ask the Court to certify eight questions. The questions will be addressed in turn, though the second and fifth questions and the third and sixth questions were addressed jointly by the parties and will be addressed jointly by

the Court.

This is not the first time opponents of campaign finance regulation have brought an as [**69] applied challenge to the Constitutionality of a narrow provision of the Act. *See, e.g., Citizens United v. Federal Election Comm'n,* --- U.S. ----, 130 S.Ct. 876, --- L.Ed.2d ---- (2010); *FEC v. Wisconsin Right to Life,* 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (*WRTL II*); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (*Colorado I*). To say these challenges were narrow is not to say they were insubstantial. In *WRTL II,* the Supreme Court held that the so-called "issue ads" that were the subject of that litigation were neither "express advocacy nor its functional equivalent" and therefore could not be constitutionally regulated. This holding affected its previous ruling in only a small part of *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), but by clarifying the definition of "electioneering communication" [*534] it had a profound impact on the acceptable use of "issue ads." The Court here must therefore determine if the Supreme Court's previous rulings have foreclosed the challenges before it, or if such a window remains open.

Overview

"The constitutional power of Congress to regulate federal elections is well-established." *Buckley v. Valeo,* 424 U.S. 1, 13, 96 S.Ct. 612, 46 L.Ed.2d 659. It has done so through enacting an intricate statutory scheme that restricts campaign contributions and expenditures across a broad spectrum of individuals and entities involved in federal political campaigns. *Buckley,* 424 U.S. at 12, 96 S.Ct. 612. Nevertheless, in *Buckley,* the

Supreme Court concluded that limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds were violations of freedom of speech and unconstitutional. 424 U.S. 1, 143-44, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). However, campaign contributions, which indicate support for a candidate but not the underlying reason for the support can be regulated because such regulations only marginally [**70] impact speech. *Id.* at 26, 96 S.Ct. 612. The Supreme Court further held that coordinated campaign expenditures-that is, expenditures that are provided by a donor which is controlled by or coordinated with a candidate and the campaign-are properly considered functionally equivalent to contributions, and are therefore also regulable. *Id.* at 47, 96 S.Ct. 612.

At issue in this case are the contribution and expenditure regulations imposed by law upon political parties in conjunction with federal election campaigns. More specifically, the plaintiffs Anh Cao, RNC, and LA-GOP challenge the following provisions of the statute: 2 U.S.C. § 441a(d)(2-3); 2 U.S.C. § 441a(a)(2)(A); and 2 U.S.C. § 441a(a)(7)(B)(i).

A. Question 1—Standing

Question One of the plaintiffs' Motion to Certify asks if each of the plaintiffs alleged sufficient injury to constitutional rights enumerated in the questions to create a constitutional "case or controversy" within the judicial power of Article III.

The FEC does not appear to oppose certification of this question, (*See* Rec. Docs. 28, 74) and instead argues that the LA-GOP does not have statutory standing to bring a Motion to Certify under the § 437h of the Act. A plain reading of the Act shows that they

are correct: "the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States." The LA-GOP falls into neither of these groups. The Court therefore certifies Question 1 as non-frivolous, but holds that the LA-GOP does not have standing to appear before the Fifth Circuit panel on the Motion to Certify.

[**71] *B. Questions 2 and 5—"Unambiguously Campaign Related"*

In *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court concluded that limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm as violating freedom of speech. *Id.* at 143-44, 96 S.Ct. 612. However, campaign contributions, which are speech primarily in their symbolic content, can be regulated. *Id.* at 26, 96 S.Ct. 612. The Supreme Court further held that because coordinated campaign expenditures are functionally equivalent to contributions, they too are regulable. *Id.* at 47, 96 S.Ct. 612.

[*535] Before *Colorado I,* 518 U.S. 604, 116 S.Ct. 2309 (1996), the FEC treated all political party expenditures as coordinated. *Colorado II,* 533 U.S. 431, 438, 121 S.Ct. 2351 (2001). But *Colorado I* held that limits on a political party's *independent* expenditures were unconstitutional. 518 U.S. at 614, 116 S.Ct. 2309. *Colorado II,* however, held that limits on a party's *coordinated* campaign expenditures, which are considered contributions under 2 U.S.C. § 441a(a)(7)(B)(i), were constitutional. 533 U.S. at 465, 121 S.Ct. 2351.

Questions Two and Five of the Cao plaintiffs' Motion to Certify are both premised on the idea that *all* campaign finance regulations are subject to an "unambiguously campaign related" requirement. Cao lists four activities that he concedes are, in fact, unambiguously campaign related: a) express advocacy; b) targeted federal election activity c) disbursements; and d) campaign literature. Question Two specifically alleges that § 441a(d)(2-3),[12] which limits [**72]

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[12] 2 U.S.C. § 441a(d):

Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office . . .

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any can-didate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (c) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds-

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the

expenditures "in connection" with a candidate's campaign, is vague and overbroad. Question Five alleges that the $5000 limit on contributions from multi candidate political committees to any candidate under § 441a(a)(2)(A)[13] and the provision defining coordinated expenditures as contributions, § 441a(a)(7)(B)(i),[14] are vague, overbroad, and beyond Congress's authority to [**73] regulate.

In support of their the arguments, the Cao plaintiffs posit a variety of factual circumstances that they allege would not be "unambiguously campaign related." For

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greater of-

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (c) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

[13] 2 U.S.C. § 441a:
(a) Dollar limits on contributions . . .

(2) No multicandidate political committee shall make contributions–

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000

[14] 2 U.S.C. § 441a:
(a) Dollar limits on contributions . . .

(7) For purposes of this subsection-. . .

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate

example, they argue that coordinated "non-targeted voter registration; non-targeted voter identification; non-targeted [*536] get-out-the-vote activity and non-targeted generic campaign activity" are not "unambiguously campaign related" and therefore cannot be regulated or restricted. (AVC ¶¶ 40, 59, 80).[15] In addition, the Cao plaintiffs assert that "issue advocacy, including ads that mention candidates" is not an "unambiguously campaign related" activity and therefore cannot be regulated or restricted, even within the 90-day or 120-day periods before an election. (AVC ¶¶ 40, 59, 80). According to plaintiffs, such ads can never be constitutionally regulated unless they contain "explicit words expressly advocating the election or defeat of a clearly identified federal candidate." (*Id.* at ¶¶ 59, 80). The RNC acknowledges it would like to coordinate with candidates the "nontargeted" activities within the scope of its claims at least in part "in an effort to help candidates win elections. . . ." (RNC 30(b)(6) Dep. at 153-54, FEC Exh. 5).

The Cao plaintiffs' primary legal argument is that the courts need to establish a cognizable line between coordinated party spending that is unambiguously

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[15] None of the coordinated communications within the apparent scope of plaintiffs' claims are currently restricted by the limits on party coordinated communications until 90 days before a Congressional or Senate election, or 120 days before a Presidential election. A party communication prior to these 90-day or 120-day windows before an election is not deemed coordinated with a candidate unless it "disseminates, distributes, or republishes . . . campaign materials prepared by a candidate," or "expressly advocates the election or defeat of a clearly identified candidate." 11 C.F.R. §§ 109.21(c)(2)-(3); 109.37.

campaign related and coordinated party spending that is not. (Rec. Doc. 76 at 15). Currently, the FEC promulgates regulations establishing how to determine whether activities fall within the provisions governing [**74] coordination. 11 C.F.R. § 109.37. Per these guidelines, party communications are coordinated expenditures if they disseminate, distribute, or republish campaign materials prepared by a candidate, if they expressly advocate for a clearly identified candidate, or if they refer to a clearly identified candidate within specified time windows leading up to elections. The Cao plaintiffs argue that the FEC's acknowledgment that some line exists demonstrates a constitutionally deficient ambiguity in the current statutory language. (Rec. Doc. 76 at 11).

Further, the Cao plaintiffs argue that the Supreme Court has consistently applied *some* test-though not necessarily the "unambiguously campaign related" test-to determine whether communications fall within Congress's regulatory power. For example, they cite *FEC v. Wisconsin Right to Life (WRTL II),* 551 U.S. at 479, 127 S.Ct. 2652, for the holding that campaign advertisements can only be regulated if they are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* (Rec. Doc. 76 at 15). *WRTL II* was an as applied challenge to part of the Bipartisan Campaign Reform Act (BCRA) facially upheld in *McConnell,* and held that the line established in *McConnell* was overbroad as applied to the facts of the case. *Id.*

The Cao plaintiffs also point to several decisions in other circuits, most notably *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274 (4th Cir.2008), that they argue demonstrate that the "unambiguously

campaign related" language applies to all campaign finance regulation. (Rec. Doc. 76 at 7).[16] Similarly, they point [*537] to a brief filed in *McConnell*, 540 U.S. 93, 124 S.Ct. 619, by [**75] supporters of the BCRA, in which they argued that BCRA was a constitutional "adjustment of the definition of which advertising expenditures are campaign related." (Rec. Doc. 62 at 7) (quoting *Brief for Intervenor-Defendants Senator John McCain et al.* at 57, *McConnell*, 540 U.S. 93, 124 S.Ct. 619 (*available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf)).

The FEC makes several counter-arguments. Their strongest arguments are interrelated: that 1) the unambiguously campaign related language and its cousins are reserved for expenditures, and have never been applied to contributions, and 2) the expenditure "lines" are the product of statutory interpretation, not constitutional limitation. (Rec. Doc. 65 at 22-26). The Court agrees. Plaintiffs are attempting to conflate the Supreme Court's jurisprudence limiting expenditures, where the content of the communication is inherently at issue and "lines" are inherently necessary, with that limiting contributions, where it is the act of coordination with political candidates that makes the communi-

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[16] They also cite *New Mexico Youth Organized v. Herrera*, No. 08-1156 (D.N.M. Aug. 3, 2009) (mem. and order granting summ. j.); *Broward Coalition of Condominums, Homeowners Associations and Community Organizations v. Browning*, No. 4:08-cv-445, 2009 WL 1457972 (same); and *National Right to Work Legal Defense and Education Foundation v. Herbert*, 581 F.Supp.2d 1132, 1149 (D.Utah 2008).

cation regulable.[17]

Since *Buckley,* the Supreme Court has never applied a limiting "line" to coordinated campaign expenditures. The portion of the *Buckley* decision that introduced the phrase "unambiguously campaign related" was explicitly discussing expenditure limits as distinct from contribution limits:

> In Part I we discussed what constituted a 'contribution' for purposes of the contribution limitations set forth in 18 U.S.C. § 608(b). We construed that term to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but [**76] earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate. . . . So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.
>
> When we attempt to define "expenditure" in a similarly narrow way we encounter line-drawing problems . . . To insure that the reach of § 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e) to

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[17] As discussed in Part C, *infra*, the Court holds that the plaintiffs' similar argument regarding "own speech" is non-frivolous, because own speech might be sufficiently independent so as not to be functionally a contribution. *See Colorado II*, 533 U.S. at 463, 121 S.Ct. 2351.

> reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is *unambiguously related* to the campaign of a particular federal candidate.

Buckley, at 78-80, 96 S.Ct. 612 (emphasis added).

Further, the line drawn in *Buckley* was to *avoid* a Constitutional difficulty, specifically as to the expenditure provisions of FECA: "in order to preserve the provision against invalidation on vagueness grounds, [the challenged provision of the FECA] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." [*538] *Buckley,* at 44, 96 S.Ct. 612. As the Court later explained, the "express advocacy line" was "an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell v. FEC,* 540 U.S. 93, 191, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). The *McConnell* court reiterated, "a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy standard." 540 U.S. at 191-92, 124 S.Ct. 619. The *McConnell* court made the above holding in the context of addressing a challenge to coordinated contributions: "there is no reason why Congress may not treat coordinated disbursements for electioneering

communications in the same way it treats all other coordinated [**77] expenditures." *Id.*

The Cao plaintiffs' reliance on *Leake* and the *McConnell* brief is similarly unpersuasive. *Leake* was about *state* campaign finance law, and the language quoted by Cao was not being used to put a fine point on the contours of regulable speech[18] : it was a background explanation of the state of campaign finance law. 525 F.3d at 281. The FEC's characterization of this language as dicta is accurate. Similarly, the brief by members of Congress in *McConnell* was not adopted by the high court and in no way reflects controlling precedent.

To the contrary, the high court has expressly noted the distinction in the level of scrutiny (and tailoring of the law) required for coordinated expenditures as distinct from independent expenditures. Coordinated expenditures pose a sufficient risk of corruption and circumvention to warrant stricter regulation. "[S]ubstantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it show beyond a serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Colorado II*, 533 U.S. at 457, 121 S.Ct. 2351. However, when an expenditure is not coordinated, the concern over corrupting influence is significantly reduced because the candidate is not beholden to the entity making the expenditure. In such cases, an "unambiguously campaign related" requirement is appropriate, because absent the heightened

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[18] The same can be said of the district court decisions cited by the plaintiffs.

risk of corruption (or the appearance thereof) the government's interest in regulation is greatly diminished: "[Independent] expenditures [are] not potential alter egos for contributions, . . . and therefore . . . qualify[ ] for the most demanding First Amendment scrutiny employed in *Buckley*. Thus, in *Colorado I*, [the Supreme Court] could not assume, 'absent convincing evidence to the [**78] contrary,' that the Party's independent expenditures formed a link in a chain of corruption-by-conduit.' " *Colorado II*, 533 U.S. at 463-64, 121 S.Ct. 2351 (quoting *Colorado I*, 518 U.S. at 617, 116 S.Ct. 2309). The *Colorado II* went on to note that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 533 U.S. at 463-64, 121 S.Ct. 2351 (quoting *Buckley*, 424 U.S. at 47, 96 S.Ct. 612).

In sum, Supreme Court jurisprudence has repeatedly emphasized that it is the coordination with the candidate, not the relationship between the speech and a [*539] campaign, that makes the communication Constitutionally regulable: "There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." *Colorado II*, 533 U.S. at 464, 121 S.Ct. 2351 (footnote omitted). Thus, "the

constitutionally significant fact" that caused to Court to allow independent expenditures in *Colorado I* (but disallow coordinated expenditures in *Colorado II*) "was the lack of coordination between the candidate and the source of the expenditure." 533 U.S. at 464, 121 S.Ct. 2351 (quoting *Colorado I*, 518 U.S. at 617, 116 S.Ct. 2309).

The Cao plaintiffs have not raised arguments sufficient to convince the Court that 2 U.S.C. §§ 441a(d)(2-3), 441a(a)(2)(A), and 441a(a)(7)(B)(i) are vague, overbroad, or beyond Congress's authority to regulate. The Court finds Questions 2 and 5 of the plaintiffs' Motion to Certify to be frivolous, and DENIES their motion as to these questions. The Court also [**79] GRANTS the FEC's motion for summary judgment as to these questions.

C. Questions 3 and 6—the "Own Speech" Claims

The Cao plaintiffs' Questions Three[19] and Six[20] argue that *Colorado II* explicitly left room for an as applied challenge for coordinated expenditures that are

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[19] "Do the expenditure limits at 2 U.S.C. § 441a(d)(2)-(3) violate the First Amendment rights of one or more plaintiffs as applied to coordinated expenditures for (a) communications containing express advocacy and (b) targeted federal election activity?" (Rec. Doc. 19 at 3).

[20] "Do the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and Coordinated Contribution Provision at 2 U.S.C. § 441a(a)(7)(B)(i) (treating coordinated expenditures as "contributions") violate the First Amendment rights of one or more plaintiffs as applied to coordinated expenditures for (a) communications containing express advocacy and (b) targeted federal election activity?" (Rec. Doc. 19 at 4).

the party's "own speech." (Rec. Doc. 76 at 26). They argue that such speech, even though coordinated, is not "functionally identical to contributions" and cannot be given the same scrutiny as coordinated expenditures that are controlled by the candidate. This argument derives from Justice Thomas's dissent in *Colorado II*, along with two footnotes in the same case, one in the majority opinion and one from Justice Thomas's dissent. In the dissent, Thomas wrote that a wide category of speech that the Court's ruling encompassed should have been "entitled to the same protection as independent expenditures." 533 U.S. at 467-68, 121 S.Ct. 2351. For example, he wrote, "in a situation in which the party develops a television advertising campaign touting a candidate's record on education, and the party simply 'consult[s]' with the candidate on which time slot the advertisement should run for maximum effectiveness. I see no constitutional difference between this expenditure and a purely independent one." *Id.* He reasoned that, based on the language of *Buckley*, such an advertisement would not be a "mere general expression of support for the candidate and his [**80] views but a communication of the underlying basis for the support." *Id.* at 468, 121 S.Ct. 2351. The majority acknowledged this possibility in their footnote 17:

> Whether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on application [*540] of the limit to specific expenditures is a question that, as Justice THOMAS notes we need not reach in this facial challenge.
>
> The Party appears to argue that even if the

> Party Expenditure Provision is justified with regard to coordinated expenditures that amount to no more than payment of the candidate's bills, the limitation is facially invalid because of its potential application to expenditures that involve more of the party's own speech. But the Party does not tell us what proportion of the spending falls in one category or the other, or otherwise lay the groundwork for its facial overbreadth claim.

533 U.S. at 456 n. 17, 121 S.Ct. 2351. Justice Thomas elaborated:

> The Court makes this very assumption [that all coordinated expenditures are functionally equivalent to contributions] ("There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate"). To the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures remains unresolved. At oral argument, the Government appeared to suggest that the Party Expenditure Provision might not reach expenditures that are not functionally identical to contributions. See Tr. of Oral Arg. 15 (stating that the purpose of the Party Expenditure Provision is simply to prevent someone "from making contributions in the form of paying the candidate's bills").

Id. at 469 n. 2, 121 S.Ct. 2351.

Not coincidentally, perhaps, the Cao plaintiffs' as applied challenge presents just the situation contemplated by Justice Thomas: the RNC and LA-GOP have developed an advertisement touting Cao's record and values and tying them to the Republican party's core values, with the following script:

> Why We Support Cao
>
> The Republican National Committee has long stood for certain core principles, which we believe are the fundamentals of good government. When it comes to the issues of lower taxes, individual freedoms and a strong national defense, we need leaders [**81] who will stand with the American people and defend those issues.
>
> We need leaders who understand that our economy is in a recession, our individual freedoms are constantly under attack and we continue to fight the global war on terrorism to keep our families safe.
>
> Joseph Cao understands and fights for those issues. And, that is why we ask you to join us in supporting him on December 6. It's important for Louisiana and important for the country.

(J. Stip. at 8). They wanted to coordinate with Cao only as to the timing of running the ad.

The Cao plaintiffs also argue that conveying the "underlying basis for support" is not the sole means by which parties could bring their coordinated expenditures out from under the umbrella of "functional" contributions. They assert that by paying for the speech directly (instead of providing the funds to the candidate to do so), a party is "adopt[ing]" the speech

as its own, "regardless [of] who came up with an idea" or whether the candidate was consulted, and therefore it is an expenditure, not a contribution. (Rec. Doc. 62 at 13-15). In this as applied challenge, they argue that the ad described above would be attributable to the party, not the candidate, because they "bear a disclaimer [*541] showing that they paid for them." (Rec. Doc. 62 at 14). In support, they point to language in *Buckley:* "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S. at 20-21, 96 S.Ct. 612.

The FEC attempts to parse the majority's language in Footnote 17 of *Colorado II,* arguing that the Court was merely explaining the limits of its decision. (Rec. Doc. 74 at 12). The FEC also argues that the Cao plaintiffs' argument was foreclosed by the Supreme Court in *Colorado I,* when it wrote that "the constitutionally significant fact [in determining whether party expenditures have a potential for corruption] . . . is the [presence or] lack of coordination [**82] between the candidate and the source of the expenditure." 518 U.S. 604, 617, 116 S.Ct. 2309 (1996); (Rec. Doc. 74 at 14). They argue that allowing the argued-for exception would allow precisely the type of circumvention the high court has for so long sought to avoid. (Rec. Doc. 65 at 21). Finally, the FEC argues that the plaintiffs' definition of "own speech" is unworkable. (Rec. Doc. 74 at 15-16). These arguments are ultimately unpersuasive.

As discussed in Part B, *supra,* the Supreme Court has repeatedly affirmed that coordinated expenditures

are comparable to contributions under a First Amendment analysis. *Buckley,* 424 U.S. at 47, 96 S.Ct. 612; *Colorado II,* 533 U.S. at 457, 463-64, 121 S.Ct. 2351. Thus, party communications that would otherwise be deemed expenditures, when coordinated, become–"functionally"–contributions. *Colorado II,* 533 U.S. at 464, 121 S.Ct. 2351. Indeed, it is the act of coordination that, to use the plaintiffs' terms, arguably make a communication "unambiguously campaign related" and regulable. The same strong justifications for such a policy discussed above also apply here: if contributions to a party are used for coordinated communications, donors could easily circumvent the existing contribution limits by donating to the party instead. *Colorado II,* 533 U.S. at 464, 121 S.Ct. 2351 ("Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits"). As has been well documented,[21] parties give large donors privileged access to candidates. Allowing unregulated coordinated expenditures for "own speech" therefore leads to a heightened risk of circumvention and improper "quid pro quos" between donors and candidates. *Colorado II,* 533 U.S. at 464, 121 S.Ct. 2351.

Despite these rather persuasive indications that coordinated communications can be Constitutionally regulated, the plaintiffs' position is not frivolous. In *Buckley,* the Supreme [**83] Court explained that contributions and expenditures are distinguishable because contributions are symbolic and do not convey the "underlying basis for the support." 424 U.S. at 21, 96 S.Ct. 612. Thus, where a coordinated expenditure explicitly conveys that underlying basis, it arguably

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[21] *See* Findings of Fact Nos. 88 to 100, *supra.*

becomes less symbolic and begins to look more like a "direct restraint on . . . political communication." *Id.* Because of this reasoning and because the Supreme Court has explicitly contemplated an analysis of this distinction, this Court finds that plaintiffs' questions raise issues that are not frivolous.

In addition to the legal argument above, the Cao plaintiffs also argue that the current coordination rules are functionally unworkable and prevent parties from actually expressing their own speech. They assert that there is no way for party officials-who are most familiar with the desired party message-to involve themselves in [*542] independent expenditures made legal in *Colorado I* because they are too intimately involved in candidates' campaigns. Under current rules, Cao argues, *any* involvement by those officials would be deemed coordinated, and subject to the contribution limits of the statute. (Rec. Doc. 77 at 31).[22]

Because the Court holds that the questions are not frivolous, it need not reach a conclusion regarding the functionality of the current legal distinction between independent party expenditures and coordinated party expenditures. The Court notes, however, that the Supreme Court has previously addressed similar arguments by political parties. In *Colorado II,* the political parties argued that coordination was necessary for the parties to operate effectively. The Supreme Court summarily rejected that argument: "[t]he assertion that the party is so joined at the hip to candidates that most of its spending must necessarily be coordinated spending is a [**84] statement at odds with the history of nearly 30 years under the act. . . .

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[22] *See* Findings of Fact Nos. 48 to 51, *supra.*

For the Party to claim after all these years of strictly limited coordinated spending that unlimited coordinated sending is essential to the nature and functioning of parties is in reality to assert just that 'metaphysical identity' between free-spending party and candidate that we could not accept in *Colorado I*." 533 U.S. at 449-50, 121 S.Ct. 2351 (quoting *Colorado I*, 518 U.S. at 623, 116 S.Ct. 2309). Indeed, despite the allegedly unworkable current independent expenditure system, in the 2008 election cycle parties spent $280,873,688. (Biersack Decl. ¶ 11, Table 15, FEC Exh. 3). Further, up until 90 days before a congressional election and 120 days before a presidential election, party communications are not subject to the coordinated expenditure limit at all, unless the communication "disseminates, distributes, or republishes . . . campaign materials prepared by the candidate" or "expressly advocates the election or defeat of clearly identified candidates." (11 C.F.R. §§ 109.21(c)(2)-(3); 109.37).

Although the Court finds the substance of Questions Three and Six non-frivolous, the plaintiffs, in their briefing, put a much finer point on the questions than those originally proposed in the motion to certify. As such, the Court will exercise its discretion in fashioning a question for the Fifth Circuit that more precisely captures the Constitutional difficulty raised by the plaintiffs' arguments.

Thus, the Court certifies the following question to the Fifth Circuit:

> Do the expenditure and contribution limits and contribution provision in 2 U.S.C. §§ 441a(d)(2-3), 441a(a)(2)(A), and 441a(a)(7)(B)(i) violate the First Amendment rights of one or more of

plaintiffs as applied to coordinated communications that convey the basis for the expressed support?

[**85] The FEC's motion for summary judgment as to Questions Three and Six is DENIED.

D. Question 4—The Constitutionality of Coordinated Expenditure Limits

Plaintiffs' Question 4 challenges the constitutionality of the current coordinated expenditure limits, in three parts:

Do the limits on coordinated expenditures at 2 U.S.C. § 441a(d)(3)[23] violate [*543] the First

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[23] 2 U.S.C. § 441a(d):

Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office . . .

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds–

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of–

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or

Amendment rights of one or more plaintiffs?

(a) Do all but the highest limits violate such rights because any lower rates are unsupported by the necessary anti-corruption interest?

(b) Is 2 U.S.C. § 441a(d)(3) facially unconstitutional because lower rates cannot be severed from higher rates and the voting-age-population formula is substantially overbroad and inherently unconstitutional?

(c) Is the highest limit for expenditures coordinated with Representatives unconstitutionally low?"

(Rec. Doc. 19 at 2). These will be addressed in turn.

i. Plaintiffs' Argument that Lower limits cannot be Constitutionally Justified Under the Anti-Corruption Rationale

The Cao plaintiffs argue in this part that higher expenditure limits in some districts or for [**86] some political offices logically preclude lower limits from being justified under the anticorruption rationale. Put otherwise, they argue that it is unconstitutional to have a system that implies "that a Louisiana Senator can be 'bought' for a little more [than] a quarter million dollars but it takes more than two million dollar to 'buy' a California Senator." (Rec. Doc. 19-2 at 12).

Plaintiffs rely on a decision in Eastern District of California, *California Prolife Council Political Action Committee v. Scully,* 989 F.Supp. 1282 (E.D.Cal.1998) for their first argument. There, the court held that a California statute that imposed variable campaign contribution limits depending on whether candidates

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Resident Commissioner in any other State, $10,000.

agreed to expenditure limits was not closely drawn, and violated the First Amendment. *Id.* at 1292, 1296.

The state financing system at issue in *California Prolife* is distinguishable from that established by § 441a(d)(3) because the California funding system created variable limits for the exact same candidate, depending on *her own choice:*

> The statute prohibits any person, broadly defined to include virtually any entity other than a political party and a small contributor committee (as defined by the statute), from contributing more than $100 per election in small local districts (less than 100,000 residents), $250 per election for Senate, Assembly, Board of Equalization and large local districts, and $500 per election for statewide office. Section 85301(a)–(c). These limits are increased to $250, $500 and $1,000, respectively, for candidates who agree to specified expenditure limits.

Id. at 1292 (footnote omitted). In this system, the same candidate could be subjected to two different contribution limits-one if they agreed to expenditure limits, and one if they did not. *Id.* at 1296. This difference led the court to conclude that the lower limit was not closely drawn to prevent corruption, because a candidate's choice to adhere to expenditure limits is a "constitutionally noncognizable condition[ ]." *Id.*

In contrast, the expenditure limit differences that result from § 441a(d)(3) do not occur [**87] within the same race. Rather, they [*544] vary with the office sought and size (in population) of the state. As such, plaintiffs' reliance on *California Prolife* is not persuasive. Nonetheless, the question remains whether Congress has discretion within the anti-corruption

rationale to set variable limits to coordinated expenditure limits based on these criteria.

In *Davis v. FEC*, --- U.S. ----, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008), the Supreme Court noted that its decision in *Colorado II* upheld the "facial constitutionality" of coordinated party expenditures. *Id.* at 2771. In striking down a provision of BCRA that applied different limits to candidates in the same race depending on whether one candidate reached a $350,000 threshold in personal spending, the Court noted that it has "never upheld the constitutionality of a law that imposes different contribution limits for candidates *who are competing against each other*." *Id.* at 2770-71 (emphasis added). Despite ample opportunity, the Court did not comment on the constitutionality of having different limits for candidates in different races. Similarly, in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000), the Supreme Court was faced with a state campaign finance system that imposed variable contribution limits "depending on specified state office or size of constituency." *Id.* at 382, 120 S.Ct. 897. The statute at issue was challenged for setting unconstitutionally low limits. *Id.* at 383, 120 S.Ct. 897. Again, despite being squarely presented with statutes comparable in nature to § 441a(d)(3), the Court did not address, much less criticize, the notion that different limits could apply in different races and geographic regions. *Id.* at 382-84, 120 S.Ct. 897; *see also Randall v. Sorrell*, 548 U.S. 230, 248, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (striking down unconstitutionally low limits in Vermont campaign finance law without addressing variable limits for different offices).

In *Buckley*, the Supreme Court held that the

judiciary has "no scalpel to probe" each possible contribution level, 424 U.S. at 30, 96 S.Ct. 612 (quoting *Buckley v. Valeo,* 519 F.2d 821, 842 (D.C.[**88]Cir. 1975)), and noted that such complex line drawing-which is "necessarily a judgmental decision"-is best left to congressional discretion. *Id.* at 83, 96 S.Ct. 612. It is legislators, not judges, who are best equipped with the "particular expertise" to assess what limits will adequately prevent corruption among their peers. *Randall,* 548 U.S. at 248, 126 S.Ct. 2479.

Absent unconstitutionally low limits,[24] it is consistent with the anti-corruption rationale to allow Congress the discretion to set different coordinated expenditure limits in different races in different states. The Court therefore holds that the plaintiffs' Question 4(a) is frivolous.

ii. Plaintiffs' Argument on Severability

Plaintiffs next argue that 2 U.S.C. § 441a(d)(3) is facially unconstitutional because lower rates cannot be severed from higher rates and the voting-age-population formula is substantially overbroad and inherently unconstitutional. The second part of this subpart-that the formula is overbroad and inherently unconstitutional-has already been addressed in Part i. The variable rate formula is constitutional. As such, the first part-that the lower rates cannot be "severed" from the higher rates-does not need to be addressed.

iii. Plaintiffs' Argument that the Highest Limits are Unconstitutionally Low

The Cao plaintiffs argue that *Randall v. Sorrell,*

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[24] *See* Part D.iii, *infra.*

548 U.S. 230, 126 S.Ct. [*545] 2479, 165 L.Ed.2d 482 (2006) stands for the proposition that low expenditure limits can be unconstitutional. They are correct. In *Randall,* the Court held that "limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 249, 126 S.Ct. 2479. In that case, the Vermont statute imposed the following contribution limits, not indexed for inflation: "The amount any single individual can [**89] contribute to the campaign of a candidate for state office during a 'two-year general election cycle' is limited as follows: governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200." *Id.* at 238, 126 S.Ct. 2479. After noting the Court's reluctance to second guess the Vermont legislature, it nonetheless held that when there is a "strong indication in a particular case, i.e., danger signs, that such risks [of harming the electoral process] exist (both present in kind and likely serious in degree)" it is the courts' duty to review the proportionality of the restrictions. *Id.* at 249, 126 S.Ct. 2479. In the Vermont statute, the Court saw three such danger signs. First, the limits, adjusted for inflation, were well below those approved in *Buckley* ($57 per election compared to $1000 per election). *Id.* at 250, 126 S.Ct. 2479. Second, the Vermont statute imposed the lowest contribution limits in the nation. *Id.* at 250-51, 126 S.Ct. 2479. Finally, the limit was lower than the lowest limit previously upheld by the Supreme Court, $1075 for Missouri state auditor. *Id.* at 251, 126 S.Ct. 2479.

However, the Cao plaintiffs have not presented any evidence that would lead the Court to question the

current expenditure limits. Although the Cao plaintiffs argue otherwise (Rec. Doc. 77 at 41-42), it is the candidate's speech that is affected by the magnitude of the contribution limits, and it is the ability of the candidate to speak effectively that the Court must safeguard. *See Buckley*, 424 U.S. at 21, 96 S.Ct. 612 ("contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy"); *Shrink*, 528 U.S. at 397, 120 S.Ct. 897 ("We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless").

[**90] Thus, the warning signs suggest in *Randall* are not present here. Indeed, the *Randall* decision reaffirmed that the limits approved in *Buckley*, far from being constitutionally suspect, should be used as a benchmark. *Id.* at 250, 126 S.Ct. 2479. The FEC has presented ample evidence that Cao was able to secure significant funding for his campaign,[25] and Cao has not countered with any evidence that the effect of Cao's political speech was weakened by lack of resources.

The Court therefore DENIES the Cao plaintiffs' Motion to Certify Question 4, in its entirety, and GRANTS the FEC's motion for summary judgment.

E. Question 7—Whether the $5000 Contribution Limit in 2 U.S.C. § 441 a(2)(A) is Unconstitutional because it

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[25] During the 2008 cycle, then-candidate Cao's congressional campaign had receipts of $242,531. As of June 30, 2009, he had reported $516,957 in total receipts. (Biersack Decl. ¶ 16, Table 23, FEC Exh. 3)

Imposes the same Limits on Parties as it does Political Action Committees

The Cao plaintiffs next argue that 2 U.S.C. § 441(a)(2)(A),[26] is "per se unconstitutional" because it imposes the same [*546] limit on parties that it does on political action committees (PACs). In support, the Cao plaintiffs again rely primarily on *Randall v. Sorrell,* 548 U.S. 230, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006). In striking down Vermont's campaign finance statute, the *Randall* court noted that the statute's "insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens harm to a particularly important political right, the right to associate in a political party." *Id.* at 256, 126 S.Ct. 2479 (emphasis in original).

[**91] Such a restriction is constitutionally problematic because it diminishes the benefits that parties seek to obtain by pooling the collective resources of their members. Thus, the *Randall* court was concerned that contribution limits that failed to distinguish between parties and individuals demonstrated that the Vermont legislature had not balanced "the need to allow individuals participate in the political process by contributing to political parties that help elect candidates with . . . the need to prevent the use of political parties 'to circumvent contribution limits that apply to

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[26] 2 U.S.C. § 441a:

(a) Dollar limits on contributions

(2) No multicandidate political committee shall make contributions-

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000

individuals.' " *Id.* at 258, 126 S.Ct. 2479 (quoting *Colorado II,* 533 U.S. at 453, 121 S.Ct. 2351). This shortcoming in the statute "prevent[s] a political party from using contributions by small donors to provide meaningful assistance to any individual candidate." *Id.* at 258, 126 S.Ct. 2479. Although the Supreme Court in that case raised the associational rights concern as one among a host of flaws that ultimately caused the Court to hold that the Vermont statute was unconstitutional, *id.* at 253, 126 S.Ct. 2479, that it was one among many does not reduce the validity of the constitutional deficiency.

The provision at issue in this case raises many of the same problems, though in a slightly different context. The Cao plaintiffs complain not that the provision in the Act treats parties identically to the way it treats individuals, as was the concern in *Randall,* but rather that it does not distinguish between parties and PACs.

Political parties occupy a unique role in American politics. A primary goal of all the major political parties is to win elections. "The ultimate goal of a political party is to get as many party members as possible into elective office, and in doing so to increase voting and party activity by average party members." (Meehan Decl. at ¶ 5, FEC Exh. 2). "In practice, electing . . . candidates is the RNC's primary focus." (*McConnell,* 251 F.Supp.2d at 470 (Kollar-Kotelly, J.)). *See also Randall,* 548 U.S. at 257-58, 126 S.Ct. 2479 ("[individuals contribute] with the intent that party [**92] use its money to help elect whichever candidates the party believes would best advance its ideals and interests-*the basic object of a political party* ") (emphasis added). Senator McCain testified, in connection

with the *McConnell* litigation, that "[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected." (McCain *McConnell* Decl. ¶ 23 [DEV 8-Tab 29], FEC Exh. 51).

In contrast, PACs are "most concerned with advancing their narrow interests and therefore provide support to candidates who share their views, regardless of party affiliation." *Colorado II*, 533 U.S. at 451, 121 S.Ct. 2351 (internal quotes omitted). Indeed, many PACs contribute to both of [*547] the major national parties in the same election cycle, under the belief that donating to a party "helps you legislatively." *Id.* at 452 n. 12, 121 S.Ct. 2351. "Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors." *Id.* at 451-52, 121 S.Ct. 2351. Parties, therefore, are funded by groups and individuals with many and varying interests. The unique purpose of parties, as compared to other political associations like PACs, arguably entitles it to heightened constitutional protection.[27]

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[27] The FEC argues that political parties' statutory advantages compared to PACs should lead the Court to the conclusion that applying equal contribution limits is constitutionally permissible. (Rec. Doc. 65 at 50). Although it is true that parties, unlike PACs, are permitted to make coordinated expenditures, 2 U.S.C. § 441a(d)(3), and have other comparative advantages (Rec. Doc. 65 at 50), this is equally an argument for why political parties are inherently

[**93] The FEC argues that the Supreme Court foreclosed this question in *Buckley* and in *Colorado II*. It did not. The cited portion of *Buckley* mentioned the predecessor to § 441a(2)(A), but did so only in the context of discussing ad hoc political groups as opposed to "established interest groups." 424 U.S. at 36, 96 S.Ct. 612. Political parties were not mentioned, nor was the constitutionality of undifferentiated limits. Similarly, the portion of *Colorado II* cited by the FEC dealt exclusively with coordinated expenditures, not contributions. 533 U.S. at 448-49, 121 S.Ct. 2351. As has been thoroughly discussed above, contributions and expenditures require distinct constitutional analysis. In fact, the *Colorado II* court suggested that parties might warrant additional constitutional protections, but declined to address the question. "There is some language in our cases supporting the position that parties' rights are more than the sum of their member's rights, *e.g., California Democratic v. Jones,* 530 U.S. 567, 575, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) (referring to the 'special place' the First Amendment reserves for the process by which political party selects a standard bearer); *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 373, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (Stevens, J., dissenting), but we have never settled upon the nature of any such difference and have no reason to do so here." *Colorado II,* 533 U.S. at 448 n. 10, 121 S.Ct. 2351. This acknowledgment by the high court that parties may possess

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different from PACs and should not be tied to the same contribution limits. Further, given the low threshold for certifying questions to the Fifth Circuit, this Court is not in a position to weigh the relative advantages of the various provisions within the Act.

uniquely protected associational rights is sufficient for this Court to hold that Question 7 is non-frivolous.[28]

[**94] *F. Question 8—Whether 2 U.S.C. § 441 a(a)(2)(A) Facially Violates the First Amendment Rights of the Plaintiffs*

Finally, plaintiffs' Question 8 raises the issue whether the $5,000 contribution limit in § 441a(a)(2)(A) facially violates the First [*548] Amendment rights of any of the plaintiffs. They raise three challenges, addressed in turn below.

(a) The limit is not adjusted for inflation, creating multiple lower contribution limits in years after passage of the statute and thereby vitiating any anti-corruption interest in all but the highest limit. (Rec. Doc. 19-2 at 16)

The Cao plaintiffs first argue that because the contribution provision is not indexed to inflation, and remains at the same level, $5000, as it was in 1976 when *Buckley* initially addressed the FECA, it can no longer be justified as necessary under the anti-corruption interest. (Rec. Doc. 19-2 at 16). In *Randall,* the Supreme Court held that a failure to

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[28] Plaintiffs' argument that parties cannot corrupt their own candidates is not persuasive. (Rec. Doc. 62 at 28). The cases cited do not support such a claim, and the *Colorado II* court noted that among the motives that contributors may have in donating to a political party is "to support any candidate who will be obliged to the contributors." 533 U.S. at 452, 121 S.Ct. 2351. The Court sees no reason why this would not apply equally to parties. Regardless, plaintiffs' corruption interest argument is not essential to the issue they raise regarding the constitutionality of the contribution limits.

index to inflation can be constitutionally significant: "[a] failure to index limits means that limits which are already suspiciously low will almost inevitably become too low over time." 548 U.S. at 261, 126 S.Ct. 2479.

The *Randall* court found the Vermont statute constitutionally infirm after examining five areas in which the statute was suspect and concluding that "*[t]aken together*" the act was not closely drawn. *Id.* at 253, 126 S.Ct. 2479 (emphasis in original). Thus, failure to index, taken on its own, is certainly not fatal to a campaign finance statute. Indeed, the *Buckley* court approved unindexed limits in 1976. *See* 424 U.S. at 35, 96 S.Ct. 612. Further, there is no evidence that the challenged limits were "suspiciously low" in 1976.

However, as the Cao plaintiffs point out, $5000 in 1976 is nearly $19,000 in today's terms. (Rec. Doc. 77 at 48) (applying the U.S. Department of Labor Inflation Calculator). Assuming that the $5000 limit was based on a Congressional determination about corruption, legislative inactivity for thirty years presents a valid basis for a facial challenge–if Congress [**95] determined that $5,000 in 1976 was the proper balance of political expression and prevention of corruption, arguably that limit must approach $19,000 today, and $5,000 might be unconstitutionally low. The Court therefore finds Question 8(a) to be non-frivolous.

(b) The additional $35, 000 that may be contributed to candidates for Senator, 2 U.S.C. § 441a(h) (adjusted for inflation to $39,900, 73 Fed. Reg. 8698), creates disparate limits so that (i) the higher limit as to candidates for Senator vitiates the anti-corruption interest as to any lower amount for candidates for Senator and (ii) the higher limit as to candidates for Senator also vitiates the anti-corruption interest as to any lower

amount for candidates for Representative. (Rec. Doc 19-2 at 16).

The Cao plaintiffs next argue that the provision in 2 U.S.C. § 441a(h) that allows parties to contribute an additional $35,000 (now adjusted to $39,900) to candidates for Senate vitiates the anti-corruption interest of any lower limits for either Senators or Representatives. As discussed in Part D.i, *supra,* the Court does not find these arguments persuasive. Complex line drawing regarding the anti-corruption interest is "necessarily a judgmental decision" best left to congressional discretion. *Buckley,* 424 U.S. at 83, 96 S.Ct. 612. The Court finds this subpart of Question 8 to be frivolous.

(c) The limit is simply too low to allow political parties to fulfill their historic and important role in our democratic republic. (Rec. Doc. 19-2 at 16).

Lastly, the Cao plaintiffs argue that the $5,000 contribution limit in 2 U.S.C. § 441a(a)(2)(A) is too low to allow political parties to "fulfill their historic and [*549] important role in the democratic republic." (Rec. Doc. 19-2 at 16). Much like their argument in Question 4, that the coordinated expenditure limit in 2 U.S.C. § 441a(d)(3) is unconstitutionally low, the plaintiffs make this suggestion without providing evidence to support the claim. As to Question 4, the Court held that the determination of whether the limits are too low must be made by reference to the *candidate's* ability to engage in political speech. In rejecting the claim, the [**96] Court noted the evidence in the record indicating that Representative Cao raised significant funds in the recent election cycles

Here, however, the Cao plaintiffs more plainly emphasize the effect on the party itself, suggesting

that the party is somehow unable to function under the current contribution limits. They quote *Randall* for two arguments in support of this claim: 1) that low limits limit the ability of a party to "assist its candidate's campaigns" and 2) that low limits "hinder the need to allow individuals to participate in the political process by contributing to political parties." (Rec. Doc. 19-2 at 18) (quoting *Randall,* 548 U.S. at 257, 126 S.Ct. 2479).

Again, the facts presented belie the Cao plaintiffs' unsupported arguments. In the 2008 election cycle, parties supported their federal candidates with a total of $529,262 in contributions, $31,256,379 in coordinated expenditures, and $54,563,499 in independent expenditures. (Biersack Decl. ¶¶ 8, 12, 15, Tables 6-9, 16, FEC Exh. 3). If the limits are hindering the parties' ability to support candidates, that evidence is not before the Court, and the plaintiffs have not provided any legal arguments that would support certifying this question for the Fifth Circuit.

The Court therefore holds that Question 8, subpart c is frivolous.

V. Conclusion

Accordingly,

IT IS ORDERED that plaintiffs' Motion to Strike (Rec. Doc. 78) is DENIED. Plaintiffs' Motion to Certify (Rec. Doc. 19) is GRANTED IN PART. The following questions are to be certified to the *en banc* panel of the Fifth Circuit Court of Appeals:

> [**97] 1) Has each of the plaintiffs alleged sufficient injury to constitutional rights enumerated in the following questions to create a constitutional "case or controversy" within the judicial power of Article III?

2) Do the expenditure and contribution limits and contribution provision in 2 U.S.C. §§ 441a(d)(2-3), 441a(a)(2)(A), and 441a(a)(7)(B)(i) violate the First Amendment rights of one or more of plaintiffs as applied to coordinated communications that convey the basis for the expressed support?

3) Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) violate the First Amendment rights of one or more plaintiffs as applied to a political party's in-kind and direct contributions because it imposes the same limits on parties as on political action committees?

4) Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) facially violate the First Amendment rights of one or more plaintiffs because it is not adjusted for inflation?

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment (Rec. Doc. 69) is granted as to all remaining claims.

Plaintiff LA-GOP does not have standing to bring the certified questions before the *en banc* panel. Those questions remain before the Court.

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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2 U.S.C. § 431(8)

(8)(A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

(B) The term "contribution" does not include—

(i) the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee;

(ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises or in the church or community room for candidate-related or political party-related activities, to

the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a political party at a charge less than the normal comparable charge, if such charge is at least equal to the cost of such food or beverage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an elec-

tion is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vii) any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan—

(I) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors;

(II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and

(III) shall bear the usual and customary interest rate of the lending institution;

(viii) any legal or accounting services rendered

to or on behalf of—

(I) any political committee of a political party if the person paying for such services is the regular employer of the person rendering such services and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26,but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

(ix) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: Provided, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(x) the payment by a candidate, for nomination or election to any public office (including State or local office), or authorized committee of a candidate, of the costs of campaign materials which include information on or referenced to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures, posters, and yard signs, but not including the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising): Provided, That such payments are made from contributions subject to the limitations and prohibitions of this Act;

(xi) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: Provided, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising; (2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and (3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

(xii) payments made by a candidate or the

authorized committee of a candidate as a condition of ballot access and payments received by any political party committee as a condition of ballot access;

(xiii) any honorarium (within the meaning of section 441i of this title); and

(xiv) any loan of money derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate, if such loan is made in accordance with applicable law and under commercially reasonable terms and if the person making such loan makes loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit in the normal course of the person's business.

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2 U.S.C. § 431(9)

(9)(A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include—

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by

a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b) of this title, but all such costs shall be reported in accordance with section 434(b) of this title;

(vii) the payment of compensation for legal or accounting services–

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26, but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: Provided, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: Provided, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

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2 U.S.C. § 431(16)

The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

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2 U.S.C. § 431(17)

The term "independent expenditure" means an expenditure by a person—

(A) expressly advocating the election or defeat of a clearly identified candidate; and

(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

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2 U.S.C. § 437(h)

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such

actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

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2 U.S.C. § 441a(a)(2)(A)

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

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2 U.S.C. § 441a(a)(7)(B)(i)

(7) For purposes of this subsection–

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

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2 U.S.C. § 441a(d)(2-3)

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(2) The national committee of a political party may not make any expenditure in connection with

the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of--

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(4) Independent versus coordinated expenditures by party

(A) In general: On or after the date on which a political party nominates a candidate, no committee of the political party may make—

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

(B) Application: For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) Transfers: A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate.

No. 10-776

In the Supreme Court of the United States

ANH JOSEPH CAO, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the limits on coordinated expenditures by a political party in the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, can constitutionally be applied to communications that a party coordinates with its candidates and then adopts as its "own speech."

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-88a) is reported at 619 F.3d 410. The opinion of the district court (Pet. App. 89a-194a) is reported at 688 F. Supp. 2d 498.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2010. The petition for a writ of certiorari was filed on December 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Election Campaign Act (FECA or Act), 2 U.S.C. 431 *et seq.*, limits the amounts that individuals, political parties, and other political committees can contribute to a federal candidate. 2 U.S.C.

441a(a)(1). FECA's contribution limits apply both to direct contributions of money and to in-kind contributions of goods or services. 2 U.S.C. 431(8)(A). For purposes of those contribution limits, an expenditure made "in cooperation, consultation, or concert, with" a candidate or his campaign (known as a coordinated expenditure) "shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). FECA permits political parties, unlike other entities, to make coordinated expenditures up to specified amounts that are above the limits applicable to other types of party contributions to candidates. 2 U.S.C. 441a(d).

Under regulations promulgated by the Federal Election Commission (FEC or Commission), a party-funded public communication (such as a political advertisement) constitutes a coordinated expenditure under FECA if it both contains a certain type of content and is the result of a certain type of conduct. 11 C.F.R. 109.37. A party-funded communication satisfies the content requirement if it either (1) at any time of year, "disseminates, distributes, or republishes * * * campaign materials prepared by a candidate" or "expressly advocates the election or defeat of a clearly identified candidate," 11 C.F.R. 109.37(a)(2)(i) and (ii); or (2) during the 90-day period before a congressional election, or the 120-day period before a presidential election, refers to a clearly identified federal candidate and is disseminated within that candidate's jurisdiction, 11 C.F.R. 109.37(a)(2)(iii)(A) and (B). A party-funded communication satisfies the conduct requirement if, *inter alia*, the creation, production, or distribution of the communication is requested or suggested by the candidate, or if the candidate is "materially involved" in decisions regarding, *inter alia*, the content or timing of the commu-

nication. 11 C.F.R. 109.21(d)(1)-(6); see 11 C.F.R. 109.37(a)(3).

2. a. Petitioners are Anh "Joseph" Cao, a former United States Representative for the Second Congressional District of Louisiana, and the Republican National Committee (RNC), the national committee of the Republican Party. Pet. App. 2a. In 2008, while Cao was running for election to the House of Representatives, he and the RNC filed a declaratory-judgment action against the Commission in the United States District Court for the Eastern District of Louisiana. *Ibid.* Petitioners filed the suit pursuant to 2 U.S.C. 437h, a special judicial-review provision of FECA. Section 437h permits certain persons (including petitioners) to challenge the constitutionality of the Act in federal district court and requires that court to make findings of fact and to certify nonfrivolous constitutional challenges to the en banc court of appeals. See *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 193 n.14 (1981).

Petitioners raised several First Amendment challenges to the Act, including a challenge to the coordinated-expenditure provisions. Pet. App. 2a.[1] Petitioners alleged that the RNC wished to run a radio advertisement expressly advocating the election of then-candidate Cao and explaining the basis for the RNC's support of Cao. *Id.* at 24a. They further alleged that the RNC wanted to coordinate with Cao the "best timing" for broadcasting the advertisement. *Ibid.* The

[1] Although the 2008 election is over, the Commission agrees with petitioners that the case is not moot with respect to the RNC because the issue before this Court is capable of repetition yet evading review. Pet. 5 n.2. The Commission is unaware of whether Cao intends to run for federal office again. If Cao has no such intent, the case is moot with respect to him.

court of appeals later determined, based upon representations by petitioners' counsel both at oral argument and in a post-argument letter to the court, that the RNC also intended to provide Cao "with advance knowledge" of the advertisement's content. *Id.* at 43a; see *id.* at 43a n.29 (detailing concession at oral argument); *id.* at 38a n.26 (describing supplemental letter from petitioners explaining that the "RNC provides a specific ad, a specific coordinating candidate, and specific detail as to coordination nature (timing, with content awareness)").

Petitioners alleged that FECA prohibited the RNC from running the advertisement because it would be considered a coordinated expenditure and the RNC had already reached its coordinated-expenditure limit for the relevant election. Pet. App. 24a-25a. Petitioners contended that this limitation was unconstitutional because the First Amendment prohibits restrictions on coordinated expenditures that are a party's "own speech." As summarized by the court of appeals, the RNC's "only argument" on this issue was that

> its own speech may not be regulated, regardless of whether the speech is coordinated. "Own speech" is defined by the RNC as speech that is "attributable" to the RNC and includes speech the candidate writes and decides how the speech is to be disseminated. In other words, the RNC argues that speech it adopts is attributed to it and therefore exempt from regulation regardless of the extent of coordination with the candidate.

Id. at 26a.

b. The district court concluded that petitioners' "own speech" claim was nonfrivolous, and the court therefore certified it (along with additional claims that

are not at issue here) to the en banc court of appeals. Pet. App. 178a-179a. The district court noted, however, that this Court's precedents contained "rather persuasive indications that coordinated communications can be Constitutionally regulated." *Id.* at 176a.

The district court observed that, under those precedents, restrictions on coordinated expenditures do not receive the type of heightened scrutiny applicable to restrictions on expenditures made without any input from the candidate ("independent expenditures"), but instead receive the lesser degree of scrutiny generally applicable to restrictions on campaign contributions. Pet. App. 176a (citing *Buckley* v. *Valeo*, 424 U.S. 1, 47 (1976) (per curiam); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 464 (2001) (*Colorado II*)). The court explained that contributions may be regulated in order to prevent corruption or the appearance thereof, and that the same rationale justifies regulation of coordinated expenditures because such expenditures are "functionally" contributions. *Ibid.*; see *Colorado II*, 533 U.S. at 441, 457-461, 464. The district court further observed that if donations "to a party are used for coordinated communications, donors could easily circumvent" existing limits on direct contributions to candidates "by donating to the party instead." Pet. App. 176a (citing *Colorado II*, 533 U.S. at 464).

3. a. The en banc court of appeals rejected all of petitioners' constitutional claims, including their "own speech" challenge to FECA's coordinated-expenditure provisions. Pet. App. 1a-88a. As to that claim, the court stated that "[b]ecause we are a court of error and only decide issues the parties bring to us, it is important at the outset to identify the RNC's sole argument on this certified question." *Id.* at 25a-26a. The court observed

that "the only argument the RNC raised in its complaint, the only argument the district court addressed, the only argument the RNC raised in its briefs to the en banc court, and the only argument the RNC's counsel was willing to make at oral argument before the en banc court" was the argument that the RNC's "own speech may not be regulated regardless of whether the speech is coordinated." *Id.* at 26a-27a (footnotes omitted).

The court of appeals rejected that argument, concluding that it "cannot be reconciled with *Colorado II*." Pet. App. 40a. In *Colorado II*, this Court upheld the coordinated-expenditure restrictions of FECA against a facial First Amendment challenge. The Court stated that "[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate," and that "there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending." *Id.* at 31a (quoting *Colorado II*, 533 U.S. at 464-465). The court of appeals found petitioners' "exceedingly broad argument," to the effect that "all coordinated expenditures paid for and adopted by the party would be considered a party's own speech and thus not subject to restriction," to be "inconsistent" with this Court's reasoning in *Colorado II*. *Id.* at 34a-35a. The *Colorado II* Court's anti-corruption rationale was "particularly important" in this case, the court of appeals continued, because petitioners had admitted taking steps to circumvent contribution limits, including by encouraging donors who had already made the maximum allowable contributions to Cao to donate to the party and by organizing events where major donors to the party could have access to federal lawmakers. *Id.* at 35a-36a.

The court of appeals acknowledged that the Court in *Colorado II* had left open the possibility of an as-applied challenge to FECA's coordinated-expenditure provisions. Pet. App. 37a. The court explained, however, that while petitioners had described their claim as an as-applied challenge, the claim was not meaningfully different from the facial challenge that this Court had addressed and rejected in *Colorado II*. *Id.* at 37a-38a; see *id.* at 32a-33a (citing *Colorado II*, 533 U.S. at 456 n.17; *id.* at 468 n.2 (Thomas, J., dissenting)). The court of appeals explained that petitioners' argument "rests not on a sufficiently developed factual record, but rather, on the same general principles rejected by the Court in *Colorado II*." *Id.* at 38a; see *id.* at 38a n.25 (observing that petitioners' complaint "chiefly rel[ies] on the rationale of the *Colorado II* dissenting opinion").

The court of appeals further concluded that petitioners had failed to preserve a narrower argument endorsed by the dissenting judges—*i.e.*, that FECA's restrictions on party coordinated expenditures cannot constitutionally be applied when the only coordination concerns the *timing* of a party advertisement. See Pet. App. 40a-48a. The court stated that the argument was "not made in the district court, nor presented to us on appeal," and that it was "wholly disavowed by [petitioners'] counsel during oral argument." *Id.* at 47a. The court also observed that petitioners had acknowledged that the coordination between Cao and the RNC regarding the RNC's proposed advertisement would have involved Cao's awareness not only of the timing, but also of the advertisement's content. *Id.* at 43a-46a. The court stated that "even if [it] were to conclude that [the narrower coordination] issue was presented, it is clear * * * that an expenditure for an ad advocating the elec-

tion of the candidate coordinated as to timing, when the candidate has knowledge of the content of the ad, amounts to a coordinated expenditure that may be constitutionally regulated under *Colorado II*." *Id.* at 47a.

b. Chief Judge Jones, joined by four other judges (out of 16 judges on the en banc court), concurred in part and dissented in part. Pet. App. 49a-82a. In Chief Judge Jones's view, petitioners had preserved the argument that the particular advertisement described in their complaint could not constitutionally be restricted when the only coordination between the party and the candidate concerned the timing of the advertisement's broadcast. *Id.* at 52a-66a. She concluded that such a restriction would violate the First Amendment. *Id.* at 66a-79a.

Judge Clement, joined by three other judges who (like Judge Clement herself) had joined Chief Judge Jones's dissent, wrote a separate concurring and dissenting opinion. Pet. App. 82a-88a. Judge Clement advocated a constitutional standard under which a party's expenditure could be regulated as a coordinated expenditure only if "it is susceptible of no other reasonable interpretation than as a general expression of support for the candidate *and* the ad was not generated by the candidate." *Id.* at 85a. She acknowledged, however, that if Cao had been consulted regarding the content of the advertisement at issue in this case, or had consented to the RNC broadcasting it, "that would indeed raise a suspicion that the parties were attempting to circumvent the rules against coordination so that the RNC could pay the bill for *Cao's* speech—the evil at which the coordination rules are aimed." *Id.* at 84a-85a.

c. Judge Jolly filed a concurring opinion. Pet. App. 49a. He stated that he would concur in Chief Judge

Jones's opinion "if [he] agreed that the argument she addresses was the question that [petitioners] were actually presenting for decision." *Ibid.* Judge Jolly "concur[red] in the result reached by the majority," however, based on his view that the majority opinion "reflects the more accurate and realistic way the case has been presented for decision." *Ibid.*

ARGUMENT

The court of appeals correctly rejected petitioners' challenge to FECA's restrictions on coordinated expenditures. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals, and petitioners failed to preserve below a central argument in the petition. Further review is not warranted.

1. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court held that FECA's limitations on independent expenditures in support of candidates violated the First Amendment. *Id.* at 39-59. The Court upheld the Act's limitations on contributions to candidates, however, see *id.* at 23-38, stating that the contribution limits "constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions," *id.* at 58. In explaining that conclusion, the Court recognized that the term "contribution," as defined in the Act, "include[s] not only contributions made directly or indirectly to a candidate, * * * but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Id.* at 78. That definition, the Court observed, "prevent[s] attempts to circumvent the

Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47.

2. Before 1996, the Commission presumed that, due to the close connection between parties and candidates, "all party expenditures should be treated as if they had been coordinated as a matter of law." *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 619 (1996) (*Colorado I*) (opinion of Breyer, J.) (emphasis omitted). In *Colorado I*, however, this Court held that parties were capable of making independent (*i.e.*, non-coordinated) expenditures and that such expenditures could not constitutionally be limited. See *id.* at 617; *id.* at 627 (opinion of Kennedy, J.). The Court remanded the case for further proceedings to consider the constitutionality of FECA's limits on party expenditures that are actually coordinated with candidates. See *id.* at 623-626 (opinion of Breyer, J.).

After the proceedings on remand, the case returned to this Court in *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*). The Court in *Colorado II* rejected the plaintiff's facial challenge to FECA's limits on political parties' coordinated expenditures. *Id.* at 437. The Court reaffirmed *Buckley*'s anti-corruption rationale for distinguishing between coordinated and independent expenditures, and it concluded that the distinction applies equally to spending by political parties. *Id.* at 463-464. The Court explained that "[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending." *Id.* at 464. The Court accordingly held that

Congress may, consistent with the First Amendment, place limits on parties' coordinated expenditures. *Id.* at 437.

3. a. The court of appeals correctly concluded that *Colorado II* forecloses the broad "own speech" argument (Pet. 12-15) that petitioners raised below and renew in this Court. Under petitioners' theory, a communication is beyond the constitutionally permissible reach of FECA's coordinated-expenditure limits if it is "attributable" to a party, no matter how great the candidate's role in the communication's content or dissemination. Pet. 19; see Pet. App. 26a. In petitioners' view, the degree of collaboration and coordination between the party and the candidate is irrelevant "even if the candidate or her campaign actually creates the communication and passes it along to the party." Pet. App. 34a-35a; see Pet. 10 n.8 ("If an ad's speech is attributable to the party, it should not be deemed a contribution even if coordinated.").

Petitioners' theory is directly at odds with the core rationale of *Colorado II*. The holding in that case turned not on the nominal identity of the speaker, but instead on the "constitutionally significant fact" of the presence or absence of "coordination between the candidate and the source of the expenditure." 533 U.S. at 464 (quoting *Colorado I*, 518 U.S. at 617 (opinion of Breyer, J.)); see *McConnell* v. *FEC*, 540 U.S. 93, 221 (2003) ("[E]xpenditures made after a 'wink or a nod' often will be 'as useful to the candidate as cash.'") (quoting *Colorado II*, 533 U.S. at 442, 446). The Court concluded that Congress may regulate a party's coordinated expenditures, not because they are deemed to be the speech of someone other than the party, but instead because their "special value as expenditures"—that is, their coordina-

tion with candidates—"is also the source of their power to corrupt." *Colorado II*, 533 U.S. at 464-465.

b. Seeking to reconcile their argument with *Colorado II*, petitioners rely (*e.g.*, Pet. 3) on footnotes in the majority and dissenting opinions in that case. With respect to the conclusion that the lower level of constitutional scrutiny applicable to contribution limits also applies to limits on party coordinated expenditures, the Court in *Colorado II* stated:

> Whether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on application of the limit to specific expenditures is a question that, as JUSTICE THOMAS notes, we need not reach in this facial challenge.
>
> The Party appears to argue that even if the Party Expenditure Provision is justified with regard to coordinated expenditures that amount to no more than payment of the candidate's bills, the limitation is facially invalid because of its potential application to expenditures that involve more of the party's own speech. But the Party does not tell us what proportion of the spending falls in one category or the other, or otherwise lay the groundwork for its facial overbreadth claim.

533 U.S. at 456 n.17 (certain citations omitted). Justice Thomas's dissent stated that "[t]o the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures

remains unresolved." *Id.* at 468 n.2 (Thomas, J., dissenting).

Although the Court in *Colorado II* acknowledged the possibility that FECA's limits on party coordinated expenditures might be unconstitutional in some applications, the Court did not suggest that the *permissible* applications are limited to "paying candidates' bills for polling, printing, rent, utilities, consultants, etc." or "paying a candidate's media bills." Pet. 14 n.9. To the contrary, the Court in *Colorado II* recognized that "[c]oordinated spending by a party * * * covers a spectrum of activity, as does coordinated spending by other political actors." 533 U.S. at 445. Under petitioners' constitutional theory, the RNC could spend unlimited sums to disseminate speech that the candidate had written, in accordance with the candidate's instructions as to the manner in which the speech should be disseminated, so long as the speech is "attributable" to the RNC. Pet. App. 26a. Petitioners thus argue that the FECA limits are unconstitutional, not simply in some small set of outlier scenarios, but with respect to spending that is little different from direct payment of a candidate's bills.

As the court of appeals correctly recognized, petitioners have not presented the type of as-applied challenge contemplated in *Colorado II*. Pet. App. 33a-38a. Petitioners affirmatively disavowed an argument that "the level of coordination should affect whether an expenditure may be regulated," *id.* at 27a, instead advancing the "exceedingly broad" argument that "Congress cannot regulate a party's own speech regardless of the degree of coordination with the candidate," *id.* at 34a. As the court of appeals observed, petitioners' argument "rests not on a sufficiently developed factual record, but rather, on the same general principles rejected by the

Court in *Colorado II*, namely the broad position that coordinated expenditures may not be regulated." *Id.* at 38a.

Essentially all of the specific arguments petitioners raise in support of their broad "own speech" argument were considered and rejected in *Colorado II*.[2] Petitioners' suggestion (Pet. 16-19) that the only "constitutionally significant difference" is "between expenditures and contributions" conflicts with *Colorado II*'s observation, in response to an analogous argument, that the relevant constitutional line is not between *contributions* and *expenditures*, but between *coordinated* expenditures and *independent* expenditures. See 533 U.S. at 463 ("The analysis" of decisions striking down limits on independent expenditures "ultimately turned on the understanding that the expenditures at issue were not potential alter egos for contributions, but were independent and therefore functionally true expenditures, qualifying for the most demanding First Amendment scrutiny employed in *Buckley*."). *Colorado II* likewise refutes petitioners' argument (Pet. 23-25) that there is no sufficient anti-corruption rationale for regulating coordinated expenditures. See, *e.g.*, 533 U.S. at 457 ("[T]he question is

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[2] Petitioners briefly suggest (Pet. 23) that this Court's decision in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), has weakened the anti-circumvention rationale underlying *Colorado II*. The Court in *Citizens United*, however, addressed limits on independent corporate spending, not on party coordinated expenditures. Indeed, the Court specifically distinguished independent from coordinated spending, emphasizing that the independent expenditures at issue in that case could not constitutionally be limited because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent * * * alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 908 (quoting *Buckley*, 424 U.S. at 47).

whether experience under the present law confirms a serious threat of abuse from the unlimited coordinated party spending as the Government contends. It clearly does.") (citation omitted).[3] And while petitioners assert (Pet. 28-29) that independent expenditures are less effective than coordinated expenditures, the Court in *Colorado II* (as in prior cases) treated the greater effectiveness of coordinated spending as a justification for allowing such expenditures to be regulated more closely than independent expenditures can be. See *id.* at 441 ("[I]ndependent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination * * * also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.") (quoting *Buckley*, 424 U.S. at 47).

Petitioners suggest (Pet. 25-34) that coordinated-expenditure limits place greater burdens on political parties than on other regulated entities. The Court in

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[3] Petitioners attempt (Pet. 24) to distinguish *Colorado II* on the ground that one practice described in that case—a system known as "tallying," whereby a party would spend money on candidates whose donors contributed to the party—was not followed here. But the Court in *Colorado II* did not hold or suggest that Congress's authority to regulate coordinated expenditures is limited to circumstances where tallying occurs. Rather, the Court simply identified that practice as one piece of evidence that coordinated expenditures can be used to circumvent contribution limits. See 533 U.S. at 458-460 & n.22. Furthermore, the findings in this case, which show that Cao urged donors who had contributed the maximum allowable amount to him to contribute additional money to the party itself, support the Court's conclusion in *Colorado II* that "[d]onors give to the party with the tacit understanding that the favored candidate will benefit." *Id.* at 458; see Pet. App. 35a-36a.

Colorado II rejected a similar contention, concluding that "[t]he Party's arguments for being treated differently from other political actors subject to limitation on political spending under the Act do not pan out." 533 U.S. at 455. The Court observed that parties are "in the same position as some individuals and [political action committees], as to whom coordinated spending limits have already been held valid," and that "indeed, a party is better off [than individuals and other political committees], for a party has the special privilege the others do not enjoy, of making coordinated expenditures up to" amounts that are higher than FECA's generally applicable contribution limits. *Ibid.* The Court also noted that "political parties are dominant players, second only to the candidates themselves, in federal elections." *Id.* at 449-450 (citation omitted).[4]

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[4] Although petitioners suggest (Pet. 32-34) that the role of political parties has materially waned since *Colorado II*, the available evidence does not support that assertion. Political parties made tens of millions of dollars in coordinated expenditures, and more than $100 million in independent expenditures, in each of several recent election cycles. Pet. App. 127a; see http://www.fec.gov/press/bkgnd/cf_summary_info/2010party_Summary/2repfedactivity2010.pdf (national Republican Party made $72,146,476 in independent expenditures in 2010 election cycle); http://www.fec.gov/press/bkgnd/cf_summary_info/2010party_Summary/1demfedactivity2010.pdf (national Democratic Party made $106,915,166 in 2010 election cycle). The magnitude of the parties' continued independent expenditures belies petitioners' suggestions that such expenditures are ineffective or that arranging for them is impractical. Furthermore, FEC guidance explains that the firewalls between regular party operatives and those involved in independent expenditures need not be as strict as petitioners claim. See, *e.g.*, *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,206-33,207 (2006) (noting that "common leadership," "overlapping administrative personnel," and "mere contact or communications" not involving inside information about election efforts do not invalidate a party's firewall procedures).

In any event, petitioners provide no sound reason to conclude that Congress is constitutionally obligated to confer advantages on political parties when it regulates campaign financing. To the contrary, "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contributions and coordinated spending limits binding on other political players." 533 U.S. at 455.

d. Although *Colorado II* did not foreclose as-applied challenges to FECA's limits on party coordinated expenditures, petitioners' reassertion of arguments that were previously rejected by this Court does not constitute a proper as-applied challenge. Cf., *e.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124, 167 (2007) (as-applied challenges contest the constitutionality of a statute "in discrete and well-defined instances"). Petitioners' reliance (Pet. 14-15) on *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), is misplaced. The plaintiff in that case did not seek to relitigate arguments that had been rejected in a previous facial challenge, but instead presented the Court with three specific advertisements, arguing that those advertisements and "materially similar" ones could not constitutionally be restricted. *Id.* at 460 (plurality opinion).

This case is instead comparable to *Republican National Committee* v. *FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010), aff'd, 130 S. Ct. 3544 (2010) (per curiam). In that case, the three-judge district court rejected a putative as-applied challenge brought by the RNC. The court observed that "a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial chal-

lenge to that provision." *Id.* at 157. This Court summarily affirmed.

e. Even if petitioners' putative as-applied challenge were not foreclosed by *Colorado II*, that challenge would not warrant this Court's review. Petitioners identify no other post-*Colorado II* court of appeals decision addressing FECA's party-coordinated expenditure limits, let alone any decision that conflicts with the Fifth Circuit's ruling here. Absent any division of authority, the petition for a writ of certiorari should be denied, even if the question it presented had not previously been resolved by this Court.

4. In addition to renewing the broad "own speech" challenge that the court of appeals rejected, petitioners ask this Court to address (Pet. 15) the narrower argument that an advertisement coordinated only as to timing cannot permissibly be regulated as a "coordinated" expenditure. The court of appeals held, however, that petitioners had failed to preserve that challenge, and petitioners offer no sound reason for this Court to address it in the first instance.

a. The court of appeals held that petitioner had forfeited the narrow timing-only-coordination argument because, *inter alia*, "counsel for the RNC refused to adopt the position that the level of coordination should affect whether an expenditure may be regulated." Pet. App. 27a. The court further held that petitioners had "conceded" at oral argument and in a post-argument letter "that the RNC intended to coordinate the Cao Ad with Cao not only with regard to timing, but *also* by providing Cao with advance knowledge of the Cao Ad's content." *Id.* at 43a; see *id.* at 43a nn.29-30.

The court of appeals addressed the merits of petitioners' narrower argument only by stating, "for the sake of

completeness," that "even if the court were to conclude that this issue was presented, it is clear to us that an expenditure for an ad advocating the election of the candidate coordinated as to timing, when the candidate has knowledge of the content of the ad, amounts to a coordinated expenditure that may be constitutionally regulated under *Colorado II*." Pet. App. 47a. The court reasoned that coordination of timing, in combination with content awareness, "contrasts sharply with the Supreme Court's functional definition of independent expenditures." *Id.* at 44a. The court noted that "if Cao approved of the content and found it favorable to his campaign, he may have told or requested the RNC to run the ad frequently during prime hours. If Cao disapproved of the Cao Ad's content and found it unfavorable to his campaign, he may have told or requested the party to run it infrequently during off hours, or perhaps not at all." *Ibid.*

The court of appeals accordingly never addressed the timing-*only*-coordination argument that petitioners now advance. This Court does not ordinarily consider issues that were neither pressed nor passed on below, see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), and there is no reason for it to do so here. To the extent that petitioners address the forfeiture issue, they simply urge this Court to adopt the conclusions of the dissenting judges on the court of appeals that petitioners preserved this claim. See Pet. 6 n.3, 8-9 & n.6. But resolving the fact-bound and record-intensive question of whether petitioners adequately preserved the timing-only-coordination argument would not be a sound expenditure of this Court's limited resources.

b. The timing-only-coordination issue would not warrant this Court's review even if it had been raised

below. Petitioners do not allege that there is any conflict in the circuits on the question. And there has been no factual development regarding the nature of the coordination that would have occurred between Cao and the RNC regarding the timing of the ad. Petitioners' complaint, the joint stipulations of fact, and petitioners' presentation at oral argument all simply indicate, in a generalized fashion, that the party and the candidate contemplated some degree of coordination. Pet. App. 24a, 25a n.16, 155a. Petitioners assert (*e.g.*, Pet. 15) that the degree of coordination would have been "*de minimis*," but neither the accuracy nor the precise meaning of that statement is clear from the existing record. The factual uncertainty regarding whether (for example) Cao could have suggested that the ad *never* be aired, see *id.* at 44a, renders this case a poor vehicle for determining how much coordination is necessary before an expenditure may be regulated.[5] Indeed, depending on the degree of coordination envisioned, petitioners' conduct might not even be covered by the FEC's regulations, which require that the candidate be "materially involved" in timing decisions before an expenditure will be considered to be coordinated. 11 C.F.R. 109.21(d)(2)(v).

Furthermore, the ability to coordinate as to the timing of campaign advertisements is not properly described as "*de minimis*." Coordination regarding timing

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[5] The same uncertainty renders this case an unsuitable vehicle for considering the test proposed in Judge Clement's dissenting opinion (which, in any event, petitioners did not advocate below). Judge Clement would have decided the case on the premise that "Cao did not provide input on the [ad's] content and was not asked to provide his consent to run the ad." Pet. App. 84a. She acknowledged that "[i]f he had, that would indeed raise a suspicion that the parties were attempting to circumvent the rules against coordination." *Ibid.*

can provide significant benefits that are unavailable in the case of truly independent expenditures. See, *e.g.*, Pet. App. 44a n.32 (Cao believed that some of the independent expenditures had not helped his campaign); FEC Matter Under Review ("MUR") 5887 (Republican Main Street Partnership PAC), General Counsel's Report #2 at 2, 6 (Dec. 9, 2008), http://eqs.nictusa.com/eqsdocsMUR/29044243895.pdf (testimony from campaign staffer that outside group's failure to time response ad appropriately made the ads far less useful and disrupted the campaign's plan to focus on other media while letting the outside group focus on television and radio). For that reason, as well as the other reasons described above, petitioners' forfeited argument challenging the regulation of party election expenditures involving "*de minimis*" coordination does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

Anh "Joseph" Cao and the
Republican National Committee, *Petitioners*

v.

The Federal Election Commission, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Reasons to Grant the Petition

The petition for a writ of certiorari presents an open question that this Court expressly reserved in *Colorado Republican Federal Campaign Committee v. FEC*. *See* 533 U.S. 431, 456 n.17 (2001) ("*Colorado-II*"). *See also id.* at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting). That open question is whether a political party's "expenditures" that contain a party's "own speech" may be treated as "contributions" if they are coordinated with the party's candidate, including whether the coordination is *de minimis* (e.g., only as to timing). The petition clearly presented this open question and offered three tests for determining where the necessary "own speech" line should be drawn. Pet. 19-22. That open question is based on the foundational distinction in *Buckley v. Valeo*, 424 U.S. 1 (1976), between "expenditures" (funding one's *own* speech) and "contributions" (funding *another's* speech). *Id.* at 19-23. *See* Pet. 16-19.

Yet FEC's opposition ignores *Buckley*'s foundational distinction. Failing to address the core issue, FEC also fails to refute Petitioners' showing (I) that the open question is an important, unresolved question that this Court should resolve and (II) that the decision below conflicts with *Buckley* and *Colorado-II*.[1]

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[1] FEC agrees that this case is not moot as to Republican National Committee ("RNC"), but "is unaware" as to Petitioner Cao's plans to run for office again and argues that "[i]f Cao has no such intent, the case is moot with respect to him." Opp'n 3 n.1. This issue need not be considered because the case is not moot as to RNC. *See McConnell v. FEC*, 540 U.S. 93, 233 (2003) ("(FEC) has standing, and

I. Whether a Party's "Own Speech" May Be Treated as a Contribution Is an Open Question Requiring this Court's Resolution.

FEC's opposition makes three central errors: (A) it fails to even address *Buckley*'s distinction between "expenditure" and "contribution" that is the core issue in this case; (B) though acknowledging that *Colorado-II* left open the "possibility" of an as-applied challenge, Opp'n 13, it refuses to recognize that the open question focused on "*own speech*" and the implications of that line; and (C) it tries to make this case facial because Petitioners provided a test for where "own speech" protection should begin. These errors are considered next.

A. The Open Question Involves *Buckley*'s "Expenditure" Versus "Contribution" Distinction.

The open question presented goes to the foundation of this Court's campaign-finance jurisprudence in *Buckley*. There, this Court applied strict scrutiny to reject *expenditure* limitations because they "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19.

But, according to *Buckley*, *contributions* "entail only a marginal restriction" on speech. *Id.* at 20. Contributions are but "general expression[s] of support for the

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therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's.") *See also Majors v. Abell*, 317 F.3d 719, 722-23 (7th Cir. 2003) ("A candidate plaintiff no more has a duty to run in every election . . . to keep his suit alive than an abortion plaintiff has a duty to become pregnant again at the earliest possible opportunity . . . . Politicians . . . often wait years before running again; obviously this doesn't show they're not serious about their political career.").

candidate and his views" without "communicat[ing] the underlying basis for the support." *Id.* at 21. Contribution limits do not decrease contributors' speech because contributions are a mere "undifferentiated, symbolic act." *Id.* Contribution limits "thus involve[] little direct restraint on . . . political communication. *Id.* And *Buckley*'s key is that "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the *transformation* of contributions *into political debate involves speech by someone other than the contributor*." *Id.* at 21 (emphases added). Under *Buckley*'s general principles, limits are permissible for undifferentiated, symbolic, indirect speech.[2]

But the *Cao Ad* does not fit that description. *See* Pet. 6. It states the underlying basis for supporting Cao. It is RNC's own, direct speech. Because RNC was prohibited from airing it, there was a "substantial rather than merely theoretical restraint[] on the quantity and diversity of political speech," 424 U.S. at 19. A speech "expenditure" was restricted, not some indirect, symbolic support for Cao.

Buckley's foundational analysis was the basis for the reference made in *Colorado-II* regarding the unresolved question of whether a party's coordinated expenditure for a communication containing its own speech could be treated as a contribution. 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). *Buckley*'s fundamental distinction and the First Amendment preclude limiting one's own speech as a contribution.

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[2] In *Colorado-II*, three Justices expressed the opinion that *Buckley* was wrong in failing to provide full, strict-scrutiny First Amendment protection to contributions. 533 U.S. at 465 (Thomas, J., joined by Scalia & Kennedy, JJ.).

But FEC's opposition is silent on this foundational analysis and core issue.

B. The Open Question Involves an "Own Speech" Line, with All Included Implications.

FEC concedes that *Colorado-II* left open "the possibility that FECA's limits on party coordinated expenditures might be unconstitutional in some applications." Opp'n 13. But it tries to evade the core issue by arguing that (1) *Colorado-II* actually foreclosed as-applied challenges based on the "own speech" formulation that it expressly left open because doing so might protect considerable speech and (2) Petitioners' decision to propose an "own speech" test forecloses an as-applied challenge. Opp'n 11-18. The first argument is answered here, the second in Part I.C.

The open question involves an *own-speech line* for distinguishing between unlimited "expenditures" and permissibly limited "contributions." This was clearly stated in *Colorado-II*, which said it did reach the constitutionality of the Party Expenditure Provision limits, 2 U.S.C. 441a(d)(2)-(3), as applied to communications "involv[ing] more of the party's *own speech*," as opposed to "no more than payment of the candidate's bills." 533 U.S. at 456 n.17 (emphasis added).

Since the open question involves an *own-speech* line, it necessarily involves *all the implications* of an "own speech" line, i.e., the full scope of communications constituting a party's "own speech." If considerable speech will be protected by an own-speech line, that likelihood was within the expectation of this Court when leaving open the own-speech question and is a compelling reason for protecting "own speech." If considerable core political speech is constitutionally protected but currently restricted, protecting it is

urgent. Consequently, it is no answer for FEC to say that this as-applied, own-speech challenge is foreclosed because considerable speech would be protected.

Yet that is what FEC argues when it asserts that an own-speech challenge is essentially facial, "directly at odds with the core rationale of *Colorado II*," Opp'n 11, and "'exceedingly broad,'" Opp'n 13 (citation omitted). FEC's effort to dodge the implications of the own-speech open question by asserting that it might reach considerable speech and that *Colorado-II* forecloses such an as-applied challenge is exactly the sort of argument that this Court rejected in *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"). *See* Pet. 14-15. FEC's effort to distinguish *WRTL-I* on the basis that WRTL challenged the electioneering-communication prohibition as applied to "three specific advertisements" and "'materially similar' ones," Opp'n 17 (citation omitted), is a distinction without a difference because here Petitioners challenge the treatment of coordinated own-speech expenditures as contributions as applied to a specific advertisement and materially similar ones. And the notion that this as-applied challenge is really facial because it merely involves "reassertion of arguments previously rejected by this Court," Opp'n 17, blatantly ignores the own-speech question, expressly left open, to which the arguments are directed.

FEC's evasion is evident in some selective quoting that ignores the "own speech" nature of the open question and implies that "although . . . *Colorado II* acknowledged the possibility" of an as-applied challenge, it already decided that party coordinated spending "'covers a spectrum of activity'" beyond just paying a candidate's bills. Opp'n 13 (quoting *Colorado II*, 533 U.S. at 445). But what *Colorado-II* did "not reach" was

the constitutionality of the Party Expenditure Provision limits, 2 U.S.C. 441a(d)(2)-(3), as applied to communications "involv[ing] more of the party's *own speech*," as opposed to "no more than payment of the candidate's bills." 533 U.S. at 456 n.17 (emphasis added). So the contrast is between a party's "own speech" and mere "payment of the candidate's bills." But FEC ignores that distinction and the "own speech" formulation of that open question, arguing that "the Court did not suggest that the *permissible* applications are limited to 'paying the candidates' bills." Opp'n 13 (emphasis in original; citation omitted). In fact, from the actual *Colorado-II* statement quoted above, 533 U.S. at 456 n.17, that limitation is entirely possible, though not yet decided. The analytical key when the issue is decided, as it should be here, is whether the proposed speech is the party's "own speech."

FEC's quote, *supra*, about party coordinated spending "cover[ing] a spectrum of activity,'" Opp'n 13 (quoting *Colorado-II*, 533 U.S. at 445), is far removed from the context of this Court's discussion in *Colorado-II* of the issue it was leaving open. FEC's use of this quote out of context and for the purpose FEC uses it is misleading. In context, its meaning is clear:

> The principal opinion in *Colorado I* noted that coordinated expenditures "share some of the constitutionally relevant features of independent expenditures." 518 U.S., at 624. But it also observed that "many [party coordinated expenditures] are . . . virtually indistinguishable from simple contributions." *Ibid.* Coordinated spending by a party, in other words, covers a spectrum of activity, as does coordinated spending by other political actors.

533 U.S. at 444-45 (ellipsis in original). The first two

sentences identify the distinction in kinds of coordinated expenditures that this Court recognized in leaving open the own-speech question, while the third sentence is descriptive of party coordinated expenditures in general, not prescriptive of regulable speech. FEC's selective quotation does not show that *Colorado-II* already decided that "own speech" expenditures could be treated as contributions

C. Providing a Logical "Own Speech" Line Does Not Make this Challenge Facial.

FEC attempts to portray this challenge as facial because Petitioners argue that the best way to identify "own speech" is identifying speech "attributable" to speakers. Opp'n 13. But Petitioners challenge the treatment of a coordinated expenditure for the *Cao Ad* and materially similar communications as unconstitutional for treating such communications as contributions when they contain RNC's *own speech*. So *Colorado-II*'s open question and this as-applied challenge are as to *own speech* communications. Nowhere does FEC argue that the *Cao Ad* is not RNC's own speech, so under any definition of "own speech" the Ad may not be treated as a contribution.

But how should "own speech" be defined? A holding that own-speech expenditures for coordinated communications may not be treated as contributions would be welcome, but of limited usefulness without guidance on what constitutes "own speech." For example, if this Court were to use a "functionally identical to contributions" test for identifying non-own-speech expenditures, 533 U.S. at 468 & n.2 (dissent), it would be left with a test like the "functional equivalent of express advocacy" test, which this Court construed with the "appeal to vote" test in *FEC v. Wisconsin Right to Life*,

551 U.S. 449, 469-70 (2007) ("*WRTL-II*") (Roberts, C.J., joined by Alito, J.), and ultimately abandoned in *Citizens United v. FEC* because of the FEC's conversion of that "objective . . . test" into a prolix, subjective, balancing test. 130 S. Ct. 876, 895 (2010).

So Petitioners have proposed a test for determining when speech is one's own (i.e., is it *attributable* to the speaker?), and the dissents have proposed other lines. Pet. 19-22. A test for "own speech" is necessary, of course, if "own speech" is indeed protected by the First Amendment as *Colorado-II* suggests it might be, but FEC proposes no better test than those proposed, nor even real critiques of Petitioners' test (other than that much speech would be protected), instead rejecting the whole enterprise.

The "own speech" formulation is directly from *Colorado-II*, and is partly defined there by what it is contrasted to, i.e., contributions "involv[ing] more of the party's *own speech*," as opposed to "no more than payment of the candidate's bills." 533 U.S. at 456 n.17 (emphasis added). The definition of "own speech" is also informed by the many descriptions in *Buckley* of the difference between "expenditures" (direct speech) and "contributions" (indirect speech). *See supra* Part I.A.. For reasons briefly set out in their petition, Petitioners believe that whether speech is "attributable" to a speaker is a good test for whether it is the speaker's "own speech." Where the line is to be drawn is something to debate in merits briefing and to be decided by this Court. But the fact that the Petitioners have proposed a defensible line as part of their analysis is a reason to grant the petition, not deny it. If Petitioners' line reaches broadly it is because the "own speech" concept is broad, and this Court left the "own speech" question open despite the broad implications of

that test. In any event, if the First Amendment requires protection of "own speech" coordinated expenditures from contribution limitations, then the breadth of "own speech" matters not. The Constitution must be followed. And the test will be ultimately drawn by this Court, regardless of what test Petitioners propose.[3]

D. Petitioners Preserved a Narrow Issue as to the Coordination of the *Cao Ad*.

As set out in the petition, Pet. (i), 8-9, 15, Petitioners not only challenge the treatment of RNC's planned expenditures for its own speech in the *Cao Ad* on an own-speech basis but also on a *de minimis* coordination basis. It is undisputed that the scope of coordination is only significant if the *Cao Ad* is not protected solely based on its nature as RNC's "own speech."

FEC argues that the coordination was not only as to timing but also as to some content of the *Cao Ad*. Opp'n 7. A meaningful discussion as to timing would necessarily be based on some notion of the *nature* of the ad, and as dissenting Chief Judge Jones argued "after the past several years in litigation Cao would have to admit his awareness of the Ad!" but "[t]iming-only is the only stipulation." App. 52a n.4. In any event, the coordination of the planned (but prohibited) *Cao Ad* was *de minimis*, and such minimal coordina-

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[3] Analogously, in *WRTL-II*, present counsel for Petitioners proposed a test for protecting the three ads at issue from the electioneering communications prohibition, *see* Brief for Appellee at 55-57, *WRTL-II*, 551 U.S. 449 (Nos. 06-969 & 06-970), but despite this proposed test and the FEC's opposition to any such test, the principal opinion adopted the "appeal to vote test" for determining which communications were "the functional equivalent of express advocacy." *WRTL-II*, 551 U.S. at 469-70 (principal opinion).

tion clearly places the ad toward the "end of the spectrum" where "expenditures . . . largely resemble, and should be entitled to the same protection as, independent expenditures," *Colorado-II*, 533 U.S. at 467 (dissent).

More substantively, FEC asserts that "Petitioners affirmatively disavowed an argument that 'the level of coordination should affect whether an expenditure may be regulated.'" Opp'n 13 (citation omitted). FEC attempts to confuse the issues. FEC fails to address the response to its argument already set out in the petition, Pet. 8-9, and so fails to rebut Chief Judge Jones's conclusion there recorded that "'Counsel conceded only FEC's regulatory interpretation of the consequences of timing-only coordination, *not* the constitutionality of that interpretation.'" Pet. 8 n.6 (citation omitted).

Petitioners did preserve a narrow *de minimis* coordination challenge to treating the *Cao Ad* as a contribution. But there are problems with *de minimis* tests, as the Clement dissent noted. App. 83a (Clement, J., joined by Jones, C.J., and Smith & Elrod, JJ., concurring in part and dissenting in part).

In sum, as shown in Part I, the petition presents an important constitutional issue that has not been, but should be, decided by this Court. Sup. Ct. R. 10.

II. The Decision Below Conflicts with *Buckley* and *Colorado-II*.

Because FEC failed to even mention *Buckley*'s foundational distinction between what must be protected as "expenditures" and what may be limited as "contributions," it has failed to rebut Petitioners' showing that the decision below conflicts with *Buckley*, 424 U.S. 1, and with the open "own speech" question preserved in *Colorado-II*, 533 U.S. 431, which was

based on *Buckley*'s "expenditure" versus "contribution" distinction.

Conclusion

For the reasons stated, the petition should be granted.

Respectfully submitted,

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